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ONTARIO LABOUR RELATIONS BOARD REPORTS

April 1985



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

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EDITOR: NIMAL V. DISSANAYAKE

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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2920-84-U Christian Labour Association of Canada, Complainant, v. Service Employees' International Union, Local 204 and **Beverly Enterprises Canada Limited** (formerly Bestview Holdings Limited and Bestview Services Limited), Respondents

Collective Agreement – Practice and Procedure – Voluntary Recognition – Unfair Labour Practice – Parties to collective agreement extending scope clause to cover areas where no employees hired and no facilities of employer existed – Rival union seeking strike down of extension as constituting employer support – Rights of complainant union or employees not affected at present – Application premature – Board not determining hypothetical dispute

BEFORE: *Paula Knopf*, Vice-Chairman, and Board Members *R. W. Pirrie* and *S. O'Flynn*.

APPEARANCES: *W. R. Herridge, Q.C., H. Kuntz* and *T. Whalen* for the complainant; *L. A. Richmond* and *R. Davidson* for the respondent union; *George Longo* for the respondent company.

DECISION OF THE BOARD; April 24, 1985

1. The style of cause is hereby amended to name the respondents as "Service Employees' International Union, Local 204 and Beverly Enterprises Canada Limited (formerly Bestview Holdings Limited and Bestview Services Limited).

2. This is an application by the Christian Labour Association of Canada (CLAC) under section 89 of the Act alleging violations of sections 49, 64, 66 and 67 and seeking a declaration that a collective agreement purportedly in force between Beverly Enterprises Canada Limited (hereinafter referred to as Beverly Enterprises) and the Service Employees International Union, Local 204 (hereinafter referred to as the SEU) is void. The facts giving rise to this complaint are not in dispute.

3. Beverly Enterprises operates a number of nursing homes in the province. In the Municipality of Metropolitan Toronto, Beverly Enterprises has two homes. The employees at the home located at 77 Main Street in Toronto are represented by CLAC and covered by a collective agreement. The employees at the home in Etobicoke are represented by the SEU as a result of a certificate issued by the Board in August of 1983. (See *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250; hereinafter referred to as the Brown decision.) As a result of the Brown decision, a certificate issued granting the SEU the exclusive bargaining rights in the Etobicoke home operated by Bestview. However, the SEU and Bestview then entered into a collective agreement on the 31st day of January, 1984 (hereinafter referred to as the SEU collective agreement) that expanded the right of representation to be as follows:

ARTICLE 2 – RECOGNITION AND SCOPE

The Employer recognizes the Union as the sole collective bargaining agent for all its employees in its nursing homes in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel, York, Durham, and Simcoe, excluding 77 Main Street, Toronto; R.R. #1, Markham; 329 Eagle Street, Newmarket; 186 Thornton Road South, Oshawa; and 291 Mississauga Road West, Orillia; save and except registered nurses and graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff.

4. It is important to note that at the time of the signing of the SEU collective agreement and up to the date of this hearing, Bestview or Beverly Enterprises operated no homes in the Regional Municipality of Peel. It only has two homes in the Region of York. These are located in Newmarket and Markham and have employees who are represented in bargaining by CLAC. Beverly Enterprises' one home in the Durham region has employees represented by the SEU. Finally, Bestview's one home in the Simcoe region has its nursing staff organized by the SEU and its housekeeping staff organized by CLAC. Thus, it can be seen that at the time the SEU collective agreement was signed for the Etobicoke home, Beverly Enterprises also accorded the SEU voluntary recognition in areas where there were and are no employees or facilities operated by Beverly Enterprises.

5. There is a long and documented history of rivalry between CLAC and SEU for representation rights of the Beverly Enterprises employees. This rivalry has spawned raids and extensive proceedings before this Board. One of the most volatile actions that has inspired the litigation and antagonism between CLAC and the SEU is the fact that CLAC's collective agreement with Bestview which clearly covers the Main Street location in Toronto and which predates the SEU collective agreement for the Etobicoke home gives CLAC exclusive bargaining rights in Metropolitan Toronto. The inevitable dispute that arose because of the two contracts was litigated before the Board in 1983 and resulted in the Brown decision mentioned above.

6. CLAC's position in these proceedings is that the voluntary recognition given to the SEU by Beverly Enterprises in these circumstances represents a violation of sections 48(a) and 64 because, insofar as it applies to Peel, York, Durham and Simcoe regions, it occurs at a time when there are either no employees in those regions or there are no employees who are not already covered by existing collective agreements. (However, it is understood by the parties that the recognition clause in the SEU contract does not conflict with the representation rights of CLAC in the homes where CLAC already has established representation rights.) CLAC relies in this complaint on the cases of this Board that have determined that voluntary recognition of a union before employees exist in a bargaining unit constitutes other support that is prohibited by section 48(a) of the Act. We were referred to the following cases: *Sunrise Paving and Construction Company Limited*, 72 CLLC 16,060 and *C. Strauss (1973) Limited*, [1975] OLRB Rep. July 581. Counsel for CLAC also pointed out that an exception to those cases exists in the construction sector that was established in *Nicholl-Radtke and Associates Limited*, [1982] OLRB Rep. July 1028; *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50 and *F.D.V. Construction Limited*, [1984] OLRB Rep. May 719. However, counsel for CLAC argued that the exception created by the *Nicholl-Radtke* and following cases was unique to the construction industry and completely inapplicable to this situation. With regard to the Brown decision, CLAC argued that it was wrongfully decided and not to be followed.

7. The purpose of CLAC's application is to have the recognition portion of the SEU 1984 collective agreement declared void insofar as it purports to grant voluntary recognition to a union over a unit of employees before the unit of employees exists. It was argued that the only possible motive of such recognition must be to give SEU a preference over CLAC, given the context to the unions' prolonged competition. CLAC states its interest in obtaining this declaration at this time is to enable it to carry out an effective organizing campaign in these areas in the event that Beverly Enterprises obtains and operates homes there. It was submitted that without such a declaration, CLAC would be forced to organize in the face of

an existing collective agreement with the SEU and that that would make CLAC's organizational campaign unnecessarily too difficult. The Board was requested to restore fair competition at the earliest date.

8. This application was strenuously opposed by the SEU. By way of preliminary objections, it was submitted that although CLAC was seeking to have the collective agreement between the SEU and Beverly Enterprises declared invalid, it was clear that CLAC does not represent any of the employees covered by that SEU collective agreement. Further, it was pointed out that no union and no employees are affected or have interests to protect as a result of the SEU collective agreement. Thus, it was argued that CLAC has no status to bring this complaint and that the complaint merely raises a moot point of law. The Board was urged not to deal with such an issue until and unless actual rights could be affected when a new home is opened in one of the relevant areas. The Board was referred to the cases of *Amoco Fabrics Limited*, [1983] OLRB Rep. Mar. 314 and *Kodak Canada Limited*, [1977] OLRB Rep. Aug. 517. In alternative submissions, counsel for the SEU also argued that this case ought to fail on its merits because of the Board's established practice of allowing parties to expand bargaining rights that were more narrowly defined when the certificate was granted (*United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776). It was also submitted that the *Sunrise Paving* case, *supra*, deals with the question of the creation of a bargaining unit as opposed to the situation in this case which would deal with changing the scope of an existing unit. In any event, it was suggested that the Board ought to wait deciding upon this issue until CLAC, or any other union, could establish that it represents even one employee covered by the purported SEU agreement because the issue is merely academic at this time.

9. In reply, CLAC stressed the practical interest it has in obtaining a declaration that the expanded scope of representation is void because, without such a declaration, CLAC would face tremendous organizing difficulties.

The Decision

10. This Board is sensitive to the difficulties and expenses parties face when they feel compelled to embark on a course of action without the benefit of the foreknowledge as to the Board's viewing such conduct or actions. But this Board cannot and should not put itself in a position of deciding academic or hypothetical questions in the abstract. This is important because without the benefits of a full factual background and the opportunity to hear from the very parties who may be affected by the decision, the Board would be unable to do justice to the issues. Also, the Board would be over-burdened with applications and would be placing itself in the position of giving advice rather than fulfilling its adjudicative function.

11. Courts have consistently declined opportunities to decide hypothetical or future questions. In *Connaught Laboratories Limited v. R.*, unreported decision of the Federal Court (Trial Division) dated July 11, 1978, cited in *Canadian Union of Postal Workers v. Attorney General of Canada*, 13 CPC 124, it was stated: It is axiomatic that the courts will not decide hypothetical and future cases. In the *Canadian Union of Postal Workers v. Attorney General of Canada*, *supra*, the plaintiff union was attempting to process a claim which alleged that an Act of Parliament was in violation of the *Canadian Bill of Rights* by restricting freedom to strike in certain circumstances. However, when the action was before the court, those circumstances no longer existed. Recognizing the court's ability to make a declaratory judgment, the court expressed caution and reserve in so doing:

Declaratory judgments are a matter of discretion, however, and in the present case, I cannot find that the declaration sought by the plaintiff would serve any useful purpose save for constituting some authority for use by plaintiff or others in other proceedings attacking similar legislation. This alone is sufficient to justify granting defendant's motion.

(At page 128.)

In that case, the defendant's motion to strike out the statement of claim was allowed because the issue raised by the plaintiff was plainly hypothetical and had ceased to be of any practical significance.

12. This Board has also been unwilling to render a decision in a hypothetical case. In the case of *Daynes Health Care Limited*, [1983] OLRB Rep. May 632, the Board was asked for a declaration that the respondent had or would shortly acquire the business of another entity. That case involved a sale of a business but the transaction had not yet closed. However, both counsel in that case asked the Board to express a preliminary opinion on the question of whether, if the transaction was completed as it was expected to be, it would amount to a transfer of a business within the meaning of section 63 of the Act. Both parties argued before the Board that the Board's opinion would be helpful to them in planning their affairs. Obviously, that situation is distinguishable from the case at hand where only one party is asking for the Board's opinion. However, in any event, the Board made it clear that it understood the parties' concerns, but was unwilling to decide the issue at that stage:

We are not unsympathetic to the parties' concerns, but we have concluded that we should not express any opinion or make any determination about the application of section 63 until the transactions said to constitute a transfer of a business have been completed. Any desire to provide guidance to the labour relations community in a difficult area of law must be tempered by a recognition that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more. Not only would such opinions encourage a recision or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. Since close cases will often turn on subtle shadings of fact, in our view it would be unwise to render opinions on what will inevitably be less than complete information. . . . It is an unfortunate fact that, like other areas of the law, the law regulating employer-employee relations has become increasingly complex and in many cases there is room for argument about how the law should be interpreted or applied. However, we do not think that the answer to this complexity or to the business planning problems faced by the labour relations community lies in this Board giving preliminary opinions on hypothetical fact situations. (Paragraph 13 page 635.)

In our view, when we are asked to give a ruling on the future rights of CLAC in the event that Beverly Enterprises opens a home in an area governed by the SEU agreement we are being placed in a situation analogous to the one before the Board in the *Daynes Health Care Limited* case, *supra*.

13. At the present time, CLAC simply cannot establish that it represents any of the employees affected by the SEU agreement. But CLAC is seeking a declaration that would govern employees who do not yet exist in locations which are not yet operated by Bestview. While such a declaration may well assist CLAC in organizational campaigns and while this Board is concerned about assisting parties in a practical and meaningful way, it is inappropriate for the Board to issue a declaration that deals with future rights and/or would simply ease an organizing campaign that may or may not occur in the future. On the other hand, the Board

would be willing to deal with the real question of representation rights when it is established that representation rights and employees' rights will actually be affected by the award.

14. Therefore, we conclude that this application is premature at this time. Because of this, we do not consider it appropriate to comment on the other interesting issues raised by counsel in the course of this hearing. The application is hereby dismissed without prejudice to CLAC raising similar issues in the future in the event that it can establish that it represents employees who would actually be affected by a determination of these issues.

1517-84-R Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, Applicant, v. **Cara Operations Limited**, Respondent, v. Canadian Union of Restaurant and Related Employees, Incumbent Trade Union, v. United Food and Commercial Workers International Union, Intervener

Certification – Practice and Procedure – Trade Union – Union intervening and leading evidence to show applicant union supported by employer – Intervener subsequently withdrawing allegation – Withdrawal not preventing Board from considering evidence of employer support already heard

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *W. G. Donnelly* and *H. Kobryn*.

APPEARANCES: *Kevin Whitaker, Alick Ryder, Q.C., Thomas Rees* and *Jim Whyte* for the applicant and the incumbent trade union; *Allen A. Morrow* for the respondent; *A. Minsky* and *K. Corporan* for the intervener.

DECISION OF THE BOARD; April 25, 1985

1. This is an application for certification. The applicant is a trade union as defined by section 1(1)(p) of the *Labour Relations Act*.

2. The respondent operates a Swiss Chalet restaurant. In its Reply, it alleges it is bound by a collective agreement between the Swiss Chalet Employers' Association (SCEA) and the Canadian Union of Restaurant and Related Employees (CURRE). CURRE did not file an intervention in this application, but counsel for Local 88 advised the Board that he was authorized to speak on CURRE's behalf. It has been a matter of uncontroverted evidence in another proceeding before this Board that Local 88 was brought into existence as the vehicle for a proposed merger of CURRE into the Hotel Employees and Restaurant Employees International Union. By a decision dated September 12, 1984, in Board File No. 2628-83-R, a differently constituted panel of the Board found that an attempt by the executive board of

CURRE to cause CURRE to merge into Local 88 was legally ineffective, and the Board declared that Local 88 had not acquired CURRE's rights, privileges and duties under the *Labour Relations Act*. The term of the agreement between the SCEA and CURRE ended November 8, 1984, and the existence of that agreement would not bar a certification application filed on or after September 9, 1984. This and a number of other applications for certification with respect to employees of Swiss Chalet Restaurants were filed by Local 88 shortly after that date. The United Food and Commercial Workers International Union (the UFCW) was granted standing to intervene in this application.

3. After several days of hearing of this and other Local 88 applications in which UFCW had intervened, on April 4, 1985, Local 88, CURRE and the UFCW entered into Minutes of Settlement. One of the provisions of their settlement was that the UFCW would withdraw its intervention and abandon its opposition to this application. This application and others came on for hearing again on April 16, 1985, at which time the UFCW requested and was granted leave to withdraw. We then completed our hearing with respect to this and the other applications then before us.

4. Having regard to the agreement of the parties, we find that all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 2955 Bloor Street West, Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. We are satisfied on the basis of all the evidence before us that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 25, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. In his capacity as spokesman for CURRE, counsel for Local 88 advised the Board that CURRE did not oppose Local 88's acquisition of the bargaining rights CURRE claimed to have, and that CURRE no longer wished to assert bargaining rights with respect to the employees affected by this application. In his capacity as counsel for Local 88, he asked that we certify Local 88 without a vote.

7. Subsection 7(2) of the Act provides that if an applicant trade union establishes that more than fifty-five per cent of the employees in the appropriate bargaining unit were members of the trade union at the relevant time, then the Board may, in its discretion, either order a representation vote or certify the applicant without a vote. When another trade union already has bargaining rights with respect to the employees in question, the Board's practice has been to order a representation vote among the employees affected by the application. However, in *Famz Foods Limited*, [1984] OLRB Rep. Dec. 1714, we reviewed the Board's jurisprudence and found:

8. We are satisfied that there is no labour relations policy that requires a representation vote between an applicant and an incumbent when the incumbent is content to abandon its bargaining rights. Of course, the existence or otherwise of a trade union holding bargaining rights with respect to affected employees is not the only factor the Board considers in determining whether

to order a representation vote notwithstanding the demonstration by an applicant trade union of membership support sufficient to warrant certification without a vote. In this case, however, none of the interested parties has put before us any other circumstance which would lead us to exercise our discretion in favour of directing a vote. There is nothing in the material properly before us in this case which suggests that the membership evidence submitted by the applicant is unreliable as a measure of the employees' desire to have the applicant represent them in collective bargaining with the respondent, or that Local 88 has been the beneficiary, directly or indirectly through the medium of CURRE, of employer support of such a nature as would disentitle it to certification. In all these circumstances, we are satisfied that we do not need the confirmatory evidence of a representation vote, and have determined not to direct that one be conducted.

8. The circumstances of this case differ from those in *Famz Foods Limited, supra*, only in that here the UFCW actively intervened for a time and, during that time, led evidence in an attempt to establish that Local 88 had been the recipient of employer support of such a nature as should disentitle it to certification. The UFCW has now withdrawn. Its allegations were abandoned before the trial of the issue they raised was complete. That does not change our statutory mandate to consider whether there are circumstances which bear on the exercise of our discretion to order a vote or, indeed, on our jurisdiction to certify at all. We could not ignore evidence of employer support or of circumstances in which employees must have perceived that their employer favoured membership in the applicant and would learn whether they joined, merely because the party who led the evidence later withdrew. However, the evidence we had heard before the UFCW withdrew was not so clear, unequivocal and compelling as to lead us to pursue it despite the UFCW's withdrawal, when no interested person now seeks to do so. We are satisfied that we do not need the confirmatory evidence of a representation vote in this case.

9. A certificate will issue to the applicant with respect to the bargaining unit described above.

1113-84-JD; 2351-84-JD; 2352-84-JD International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, Complainant, v. **Delform Construction Limited** and Labourers' International Union of North America, Local 183, Respondents, v. Metropolitan Toronto Apartment Builders Association, Intervener #1, v. Form Work Council of Ontario, Intervener #2, v. Inducon Construction (Northern) Inc. and Inducon Development Corporation, Intervener #3; International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, Complainant, v. Delform Construction Limited, Inducon Development Limited, Cooper Construction Ltd., and Labourers' International Union of North America, Local 183, Respondents, v. Metropolitan Toronto Apartment Builders Association, Intervener #1, v. Form Work Council of Ontario, Intervener #2; International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, Complainant, v. Verdi Forming Ltd., Sussex Contractors Ltd., Matthews Group Ltd., Ontario Formwork Association, and Labourers' International Union of North America, Local 183, Respondents, v. Metropolitan Toronto Apartment Builders Association, Intervener #1, v. Form Work Council of Ontario, Intervener #2

Jurisdictional Dispute – Scope of Board direction under s.91(1) – Whether Board having jurisdiction to make direction against persons other than party being complained about

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *David Starkman* and *Stan Arsenault* for International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, *Carl Peterson* for Delform Construction Limited, *Verdi Forming Ltd.*, *Matthews Group Ltd.* *Sussex Contractors Ltd.* and *Ontario Formwork Association*; *Joseph M. Watson* and *Jeffrey Davies* for Inducon Development Co.; *B. Fishbein* and *R. Lotito* for Labourers International Union of North America, Local 183 and *Form Work Council of Ontario*; *Karl Mallette* for the Metropolitan Toronto Apartment Builders Association; *David Brisbin* and *George Knapton* for the Rodmen Employer Bargaining Agency.

DECISION OF THE BOARD; April 30, 1985

1. These are three complaints under section 91 of the *Labour Relations Act* relating to the assignment of certain work. As of yet, the Board has not heard any evidence with respect to the merits of the complaints. This decision deals only with two preliminary matters raised by the parties.
2. The two preliminary matters arise out of the wording of subsections (1) and (2) of section 91 which are set out below:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union

or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person do or refrain from doing with respect to the assignment of work.

(2) The Board may in any direction made under subsection (1) provide that it shall be binding on the parties for other jobs then in existence or undertaken in the future in such geographic area as the Board considers advisable.

3. With respect to all three complaints the International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Local 721) is seeking a Board direction of the type referred to in section 91(2), namely one which will be binding on the parties for jobs other than the job giving rise to the complaint. The respondents contend that the Board lacks jurisdiction to make such an order. In support of this contention, the respondents rely on statements contained in previous Board decisions as to when the Board will generally make a direction of the type referred to in section 91(2). The respondents contend that these circumstances are not present with respect to instant complaints. We are satisfied that the argument being raised by the respondents is not one which relates to the Board's jurisdiction to make the type of order contemplated by section 91(2). Rather, the argument goes to the question of whether it would be appropriate for the Board to make such orders. That is a matter best left to be decided after the complaints have been heard on their merits and not by way of a preliminary motion.

4. The second preliminary issue turns on the wording of section 91(1). The complaints before the Board relate to the claim that the respondents Delform Construction Limited and Verdi Forming Ltd. have assigned certain work to members of Labourers' International Union of North America, Local 183 as opposed to members of Local 721. It is not disputed that these are the types of complaints contemplated by section 91(1) and that at the conclusion of the hearing the Board, if it deems it appropriate, will be able to make directions to Delform Construction Limited and Verdi Forming Ltd. relating to the work assignments. However, Local 721 takes the position that the Board will also have jurisdiction to make directions binding on the other named respondents. In support of this position the Local relies on the wording in section 91(1) that permits the Board to direct what any person shall do or refrain from doing with respect to the assignment of work. The respondents, however, all contend that the Board lacks jurisdiction to make an order against any of the respondents other than Delform Construction Limited and Verdi Forming Ltd.

5. Section 91(1) provides that a complaint can be made against a trade union, a council of trade unions, an officer, official or agent or a trade union or council of trade unions that is requiring an employer or an employers' organization to assign work to certain persons. It also provides that a complaint can be made against an employer that is assigning work to persons in a particular trade union as opposed to persons in another trade union. With respect to such complaints the Board can direct what action, if any, is to be taken by the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them. This wording clearly enables the Board to make a direction against the party being complained about. However, in addition, section 91(1) also provides that the Board can direct what action any person shall do or refrain from doing with respect to the assignment of work. If it were the case that a direction could only be to the party being complained about, there would be no need for the additional reference

to any person. This, to our mind, suggests that the Board can, in an appropriate case, make a direction to a person other than the party being complained about. While it is always difficult to speculate, perhaps such a direction might be made so as to ensure that another Board direction to the party being complained about can in fact be carried out.

6. Having regard to the foregoing, we are satisfied that the Board does have jurisdiction to make a direction under section 91(1) against persons other than the party being complained about. Given that we have heard no evidence, we cannot say whether these are the type of cases where such a direction might be appropriate. Nor are we in a position to decide which of the respondents qualify as a person. These are matters which will have to wait until the complaints are dealt with on their merits.

7. This panel is not seized on the merits of the complaints.

2097-83-R United Brotherhood of Carpenters and Joiners of America, Local Union 93, Applicant, v. **Gisar Contracting Limited**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener

Bargaining Unit - Certification - Construction Industry - Whether persons employed in formwork job carpenters or labourers - Distinct trade classification of form setters not recognized

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *B. L. Armstrong* and *J. Wilson*.

APPEARANCES: *Denis J. Power* and *Frank Manoni* for the applicant; *Mark Contini* for the respondent; *L. Steinberg* and *Andre Roy* for the intervener.

DECISION OF THE BOARD; April 1, 1985

1. This is an application for certification in the construction industry involving, *inter alia*, a request that the Board certify the applicant pursuant to the provisions of section 8 of the *Labour Relations Act*.

2. The application raises a number of potential issues before the Board, and all parties agreed that the Board before proceeding further ought to determine the question of the appropriate bargaining unit, and of the particular employees falling within that bargaining unit as of the date of the application. The Board accordingly appointed one of its officers to inquire into and report to it on the list and composition of the unit.

3. The officer's report has now been submitted and reviewed by the Board, together with the parties' oral representations thereon. The issues thereby raised for the Board are neatly set out in a letter from counsel for the applicant Carpenters' dated September 28, 1984, and it would be useful to refer at this point to the history of this matter as set out in that letter.

4. On December 5th, 1983, the Carpenters' Union, Local 93, submitted an application for certification on behalf of all carpenters and carpenters' apprentices in the employ of the Respondent in all sectors, save and except non-working foremen and persons above the rank of non-working foreman.

5. On December 13th, 1983, the employer filed its reply, indicating that it had forty employees on the job in question and describing the appropriate bargaining unit as follows:

All construction employees of the Respondent in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

6. The employer also took the position that there were no employees designated as carpenters or carpenters' apprentices engaged on the project.

7. On December 15th, 1983, the Labourers' Union, Local 527, intervened, alleging that the application was untimely on the basis that it held the bargaining rights. It also took the position that the bargaining unit requested by the Carpenters' Union was inappropriate. On the same day, the Labourers' Union, Local 527, filed an Application for Certification by Intervener, Construction Industry. It described the appropriate bargaining unit as follows:

All construction labourers, carpenters and carpenters' apprentices and cement finishers and cement finishers' apprentices in the employ of the Respondent in all sectors of the construction industry, other than the industrial, commercial and institutional sector thereof, in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foremen.

8. The Labourers' Union alleged that there were forty-three persons in its proposed unit. This application for certification was filed without prejudice to the fact that the Labourers' Union alleged that it was a party to a collective agreement with the Respondent, dated August 29th, 1983, covering the employees affected by its application.

9. That collective agreement is the pick-up of a formwork agreement between the Ontario Form Association and the Formwork Council of Ontario. It contains wage classifications for, *inter alia*, form-(builder) setters and form helpers, and all of the twenty-five persons now in dispute in this application were employed pursuant to that agreement as form setters, some through the intervener's hiring hall, and some through another job site of the respondent (also under the formwork agreement of the Labourers'). The Carpenters' certification application was not filed during the open period of that collective agreement, so that unless the Carpenters' can show that the persons it now seeks to represent were somehow improperly being treated as falling under the formwork agreement, or, that the agreement itself is invalid, as the Carpenters' allege, the Carpenters' application will be untimely in any event.

10. At the initial meeting with the officer, the parties took the following positions regarding the list and the bargaining unit proposed by the Carpenters' Union:

A. The Employer -

i. There are no employees in the bargaining unit proposed by the Carpenters' - ie, no carpenters or carpenters' apprentices;

ii. In the alternative, if there were any employees in the unit, the unit should include all twenty-five persons listed by the Employer as form setters, since they are, in essence, carpenters or carpenters' apprentices or, at least, perform indistinguishable functions. Accordingly, the Carpenters' Union lacks the necessary representation percentage;

iii. Form helpers are properly excluded from the proposed bargaining unit.

B. The Labourers' Union -

i. The Labourers' Union adopted Points (i) to (iii) as above set out;

ii. In any event, its collective agreement is a bar to the Carpenters' application.

C. The Carpenters' Union -

i. The proposed bargaining unit is appropriate and includes only eight persons on the lists, all of whom are designated by the Employer as form setters. The Carpenters' allege that, in the Ottawa area, there is no such recognized trade designation as form setters - or form helpers, for that matter. All other persons described as form setters are outside the proposed bargaining unit, as they were labourers who did not perform work within the carpenters traditional bargaining unit - ie, the other seventeen of the twenty-five form setters are distinct from the eight above-mentioned persons.

ii. The persons described as form helpers are labourers clearly outside the unit proposed by the Carpenters' and, in any event, there is no such trade jurisdiction in the Ottawa area.

11. The basic position of the Applicant with regard to the appropriate bargaining unit and the list is that there is a community of interest between the eight carpenters in that they perform essentially the same duties and responsibilities which are separate and distinct from the other seventeen form setters and that it would be contrary to established precedent and practice to lump the eight in with the other seventeen. The Applicant Union also submits that, in fact, to do so would result in the destruction of a long-established trade representation practice in this locale - a practice that has been not only recognized by the Labour Board but by the Labourers' Union.

12. Further, the Carpenters' Union takes the position that there is actually a conflict of interest between the group of eight and the group of seventeen in that the employer had attempted to require the eight to pass on their trade skills to the seventeen. The Applicant also alleges that, save for work that has been traditionally recognized as labourers' work, the Council's formwork agreement has only on one isolated occasion been applied in this area. The Applicant submits that the seventeen persons in dispute are neither carpenters nor carpenters' apprentices notwithstanding that the evidence is to the effect that some of them do some form construction work.

13. Dealing with these various positions, the Board notes that the question of community of interest in the construction industry was recently commented upon by the Board in *Dufresne Piling Co.*, [1984] OLRB Rep. July 924, cited by the applicant. The Board wrote:

The basis of the applicant's challenge to the inclusion of the names of Mr. French and Mr. Cardinal on the list of bargaining unit employees is two-fold. One of the grounds is based on the applicant's contention that at the relevant time both Mr. French and Mr. Cardinal were primarily employed by the respondent as labourers and not truck drivers. In the alternative, the applicant contends that if the two individuals were employed as truck drivers, given that

they were driving service trucks as opposed to the tandems, floats and dump trucks driven by the respondent's other drivers, there is not a sufficient community of interest to include them in a unit with the other drivers.

The community of interest issue is the simplest one to deal with. In recognition of both the structure of trade union organization in the construction industry and the provisions of section 6(3) of the Act, the Board generally describes construction industry bargaining units in terms of a particular craft or classification of employee. This means that rather than be required to apply to be certified for a bargaining unit comprised of all of the respondent's employees, the applicant can apply to be certified for a unit comprised only of truck drivers. However, where, as here, a union seeks to be certified for a unit limited to a particular craft or classification, the Board requires that all employees pertaining to that craft or classification be included in the bargaining unit. Were it otherwise, the result would be an even greater proliferation of construction industry bargaining units than is the case at present, a result that would serve no useful industrial relations purpose. Given these considerations, we are of the view that if at the time of the filing of the application Mr. French and Mr. Cardinal were in fact employed as truck drivers, then they should be included on the list of employees, regardless of the type of trucks that they were driving.

14. In that case, the Board could assess the question whether either of the individuals in dispute were employed as truck drivers by applying, at least initially, a relatively simple yardstick: did they spend a majority of their time driving a truck? No such simple criterion is afforded the Board in the present case. The question before the Board is What is a carpenter?, and it arises in the context of a *formwork* job, a notorious battleground for jurisdictional skirmishes between Carpenters' and Labourers' unions over the years. See, e.g. *Verdi Forming Ltd.*, [1983] OLRB Rep. Oct. 1728; *Urban Consolidated Construction Corp.*, [1977] OLRB Rep. Feb. 41; *Dunkey Construction Ltd.*, [1971] OLRB Rep. Dec. 813. And to complicate matters, the respondent and intervener seek to introduce an additional trade classification, that of form setter, as an answer to the applicant's claim that the individuals it seeks to represent are carpenters.

15. The Board is of the view, as a starting point, that the evidence before it fails to establish the existence, at least in the Ottawa area, of a distinct and identifiable trade classification called form setter. Indeed, the Labourers' themselves in their application for certification by intervention do not call upon the Board to recognize a bargaining unit in those terms. The question before the Board, then, is whether the individuals in dispute are essentially carpenters, or labourers. And clearly some of them, as the applicant submits, are performing work that has traditionally been identifiable with carpenters. The first position of the respondent and intervener, therefore (that the respondent only employs form helpers and form setters, but no carpenters) is rejected. The only question, then, is how many of the respondent's employees can be said to be carpenters, and accordingly included within the bargaining unit of carpenters and carpenters' apprentices which the Carpenters' have applied for.

16. To recapitulate the positions adopted on that point, the applicant was of the view that only eight of the twenty-five persons employed as form setters on the date of the application were really carpenters. The respondent and intervener, on the other hand, maintained that all of the twenty-five form setters employed on the date of the application were doing essentially the same work, so that if the eight chosen by the applicant were carpenters, the other seventeen must be carpenters as well. It is apparent from these arguments, and from the transcript, that the use of the term form setter is of little assistance in deciding the issue before the Board. The applicant points to assertions in the transcript by employees other than

its eight that they are form setters, not carpenters. But the term carpenter for at least some of these witnesses appeared to denote formal registration as such in the Province of Quebec, where registration is apparently required. In Ontario, however, carpentry is not one of the trades for which certification has been legislated as mandatory. The witness's answers may also reflect the fact that such witness was officially hired in the classification of form setter, under the terms of the Labourers' formwork collective agreement. That fact, however, has not prevented the applicant from claiming that eight of the persons equally so hired are carpenters by virtue of the work they are performing. Similarly, having heard the evidence, the applicant has agreed that form setter Dwight Mullins is a carpenter as well. Nor do we think it likely that the Carpenters' Union would place undue weight on the fact the employer had seen fit to designate certain of its employees as form setters (nor place too narrow a construction on the term carpenter), were it in the course of pressing a grievance or jurisdictional dispute before the Board over a failure to employ its members pursuant to the terms of an existing *Carpenters'* collective agreement.

17. In fact, there *is* a jurisdictional dispute outstanding before the Board, filed by the Carpenters', concerning, *inter alia*, this very job. See Board File No. 2175-83-JD. In it the Carpenters' Union describes the work that it claims as its own as:

All work normally carried out by carpenters and joiners and, without restricting the generality of the foregoing, all shoring and underpinning; all false work and the construction, erection and assembling of form work for concrete, including levelling and layout and the erection of shoring and steel jacks; the stripping of prefabricated panel forms designed for specific re-use and the releasing of the wedges or clamps and the removal of the plywood sheathing from the concrete surface of the wall on built in place wall forms; the setting of templates and anchor bolts; and the construction of all wood scaffolding and the erection of all types of scaffolding for work of this trade.

While that may be a *pro forma* description for jurisdictional dispute purposes, the Carpenters' Union has made no concessions with respect to it before the Board, and is not now in a position to deny it for the purposes of this related application for certification. The question, then, is to what degree each of the individuals in dispute were employed at the material time in the performance of the carpenter's work described above.

18. Having reviewed the transcript of the evidence, the Board must conclude that *all* of the individuals in dispute were being employed at the material time on a substantial and continuous basis in the performance of the carpenter's work so described, as opposed to the kind of labourers' function referred to by one of the witnesses, for example, as a transport. The only exception to this which emerges from the transcript is with respect to Mr. Nadon, who appears to have been primarily engaged later in the job in no more than the placing of forms. But the application was filed in early December, and it appears that Mr. Nadon during the month of December was employed solely in the patching of forms to fit around the concrete columns (which would be carpentry work). As for the rest of the seventeen form setters, their work was generally confined to actually marking, cutting, and working with the wood, and performing one aspect or the other of the work claimed by the applicant to be traditional carpenter's work. To varying degrees they own their own carpentry tools, and, contrary to the case of *Letham, Jarvela and Robertson*, [1984] OLRB Rep. Aug. 1113 (re: skill saw), no restrictions are placed either in theory or in practice on the tools that they are permitted to use. The work in residential forming is highly repetitive, and in most cases the more experienced carpenters conceded in their evidence that the other form setters working with

them were able to carry on on their own once shown how the employer wanted the job laid out. An exception to this is the statement by Mr. Mullins (conceded after the examination to be a carpenter) that he would not leave Mr. Lobo and Mr. Leblanc alone with a blueprint to do a job on their own; but if by this he meant *continuing* a job without supervision, his evidence is specifically contradicted by Mr. Lobo, who, in answer to who was working with him on cutting and setting the forms for the columns, said:

Never anybody, I did not need any co-worker to work with me, only one labourer to get the materials close to me and that was all.

Apart from that, Mr. Mullins conceded that each of the members of his crew did the same type of work as he did, as did Mr. Kaerbye and Mr. Patenande, two of the lead-hands identified by the applicant as carpenters.

19. It was Mr. Kaerbye and Mr. Patenande, in fact, upon whom the applicant was able to obtain agreement with respect to having their evidence accepted as representative of all eight individuals the applicant seeks to represent, and it would appear to be this lead hand function, attaching at least to Mr. Kaerbye and Mr. Patenande, upon which the applicant primarily relies in distinguishing the work of its eight from the other seventeen. The evidence of Mr. Kaerbye, in particular, however, is instructive:

If I understand it correctly, would it be fair to characterize your position in respect to the other members of your crew as a lead hand?

Yes.

What in your view is a lead hand? What does a lead hand do?

They just tell the people what to do, make sure they're working and make sure everything is right.

Now once you've instructed them as to what to do and how to do it, isn't it the case that you work along side with them?

Oh yes.

You don't just stand there and direct them?

Oh no.

So you're doing the same work that they're doing once you've instructed them?

Yes.

And you use the same tools?

Yes.

And really your job is to pass on instructions from Mr. Villeneuve and to make sure that it's done properly?

Yes.

And if after you've given instructions to your crew somebody just came to the site and didn't know you, they wouldn't be able to tell you apart from the other members of your crew in terms of the work you were doing?

No.

Because you do use the same tools?

Yes.

As with any job of some skill, there will be gradations of both experience and capability within a job class; but it hardly follows that only the most senior members of the job class, upon whom management depends to carry and explain its requirements to the crew, are the only ones truly belonging to that job class. Nor do we find merit in the submission that the eight (now nine) carpenters the applicant seeks to represent are being forced by the employer to pass on their formwork skills to the other form-setters. The evidence establishes that some of those other form-setters have been performing the very work they are now doing for a good number of years. On the basis of all of the evidence before the Board, we must conclude that all twenty-five of the respondent's form setters were performing traditional carpenter's work, as described by the Carpenters' Union itself, to such a degree as to properly fall within the description of the applicant's bargaining unit. The number of employees in that bargaining unit on the date of the Carpenters' application, therefore, is twenty-five.

20. Having made that determination, the Board will await notification from the applicant as to how it now wishes to proceed. The Board would note, however, that just as the use of the term form setter does not necessarily preclude someone from being a carpenter for the purposes of an application for certification by the Carpenters' Union, neither would being a carpenter appear to necessarily preclude that same person from being a form setter under the terms of the Labourers' collective agreement (outside, at least, the province-wide bargaining provisions of the *Labour Relations Act*: cf. *Manacon Construction Limited*, [1983] OLRB Rep. March 407; *Diversified Sheet Metal Limited*, [1981] OLRB Rep. Nov. 1575). The Carpenters' in the present application may, in other words, still be faced with a timeliness problem.

3323-84-R United Food and Commercial Workers International Union Local 175, Applicant, v. **Hunter Douglas Canada Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Employer having only one facility in municipality – No plans but mere possibility of second facility in future – Board not describing unit with reference to existing division – Usual policy of municipality wide description applied

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *H. Kobryn* and *J. Wilson*.

APPEARANCES: *J. James Nyman*, *Bruce Zufelt* and *Matti McKay* for the applicant; *Bruce Pollock*, *Ralph Brehn*, *Ken Telmer* and *Noel Bartholomew* for the respondent; *Kevin Watson*, *Wayne King* and *Chris St. John* for the objectors.

DECISION OF THE BOARD; April 23, 1985

1. The name of the respondent is amended to read: Hunter Douglas Canada Limited.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties are in agreement on the description of the bargaining unit appropriate for collective bargaining with the exception of a difference on whether the bargaining unit ought to be described with reference to in the City of Mississauga or with reference to in its Architectural and Window Covering Products Division in the City of Mississauga. It is the position of the applicant that the bargaining unit ought to be defined with reference to the City of Mississauga. It is the position of the respondent that the bargaining unit ought to be defined with reference to the named Division.
4. At the present time the respondent has only one facility in Mississauga. However, the respondent stated that while it had no plans to put in a new division in Mississauga, it could put another division in Mississauga. The respondent is a large Canadian organization which has three other divisions in addition to the division which is affected by this application. Other divisions of the respondent have operations in the greater Metropolitan Toronto area.
5. The Board's practice with respect to defining the geographic boundaries of appropriate bargaining units and ensuring the stability of bargaining rights was set forth in *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293 at page 295, where the Board stated:

6. The Board in *Wix Corp Ltd.*, [1975] OLRB Rep. Aug. 637 canvassed in some detail the Board's practice with respect to defining geographic limitations in the appropriate bargaining unit. Apart from the construction and perhaps certain service industries, the Board's policy, where the employer has employees at only one location within a municipal area, is to describe the bargaining unit in terms of the municipality itself (*Perimeter Industries Limited*, [1973] OLRB Rep. March 174). On occasion the Board will expand its definition of the bargaining unit to encompass an area greater than a single municipality (see *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. Feb. 1178; *The Adams Furniture Company Limited*, [1975] OLRB Rep. June 491; and note as well the Board's normal unit of

the Municipality of Metropolitan Toronto), but is reluctant to do so in the absence of compelling reasons (*Wittich's Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Del Zotto*, [1972] OLRB Rep. June 637 and *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262). The primary reason for this policy of municipality-wide bargaining units is the Board's concern for stability of bargaining rights; i.e., the union's bargaining rights will not be affected by a subsequent move of the employer's operation to some other location within the same municipality. On the other hand, actual accretions to the employer's operations within the municipality, such as a second or third plant, will automatically be covered by the union's certificate. To this latter extent, the right of self-determination of a bargaining agent by the employees at these new locations is compromised, in favour of the over-riding concern for stability of bargaining rights.

6. In the instant application the respondent has one facility in Mississauga and has no plans for any subsequent facilities in Mississauga. The arguments of the respondent based upon any future facilities in Mississauga are based upon hypothetical facts and are therefore purely speculative in nature. While section 3 of the Act does state that every person is free to join a trade union of his own choice and to participate in its lawful activities, it ought not to be read in isolation. Section 3 is to be applied to the facts in this application. On the one hand the interests of present employees who have indicated they wish to be represented by the applicant are to be considered and on the other hand there are the highly speculative interests of future persons who may or who may not become employees of the respondent in Mississauga. As the Board stated in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which an employer operates.

7. In balancing the interests of present employees against the possible interests of unforeseen future employees, the balance is struck in favour of addressing the interests of present employees in the stability of their bargaining relationship with the respondent. With respect to the respondent's arguments that the appropriate bargaining unit be defined with respect to one of its divisions, the Board is not persuaded that its arguments have any merit. The respondent acknowledges that the bargaining unit ought to be described without reference to a municipal address in the interests of stability of bargaining rights while arguing for the reference to one of its divisions in defining the appropriate bargaining unit.

8. In our view, the arguments of the respondent must fail. The inclusion of a reference to a division of the respondent in the appropriate bargaining unit is a destabilizing factor in bargaining rights. It is arguably open to the respondent to change its internal corporate structure and change and/or substitute a different division in its present premises in Mississauga. It is arguably even easier to effect a change in the internal corporate structure of the respondent than it is to relocate to a new address in Mississauga. For these reasons the appropriate bargaining unit is to be described without reference to a division of the respondent in the City of Mississauga.

9. Having regard to the foregoing, the Board further finds that all employees of the respondent in the City of Mississauga, save and except lead hands, persons above the rank of lead hand, office, clerical and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board notes the agreement of the parties and notes for the purpose of clarity

that lead hands are the first line management and are therefore excluded in accordance with the provisions of section 1(3)(b) of the Act.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 21, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

1948-84-U Raphael A. Julien, Complainant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Respondent

Duty of Fair Referral – Duty of Fair Representation – Unfair Labour Practice – Members classified as pipeline helper given priority in referral to pipeline helper work – Whether contrary to referral duty – Whether union official's comments during executive board meeting to deal with complainant's concerns within ambit of duty – Fair representation duty only concerned with representation vis-a-vis employer

BEFORE: *Robert D. Howe*, Vice-Chairman.

APPEARANCES: *Leroy A. Crosse* and *Raphael A. Julien* for the complainant; *L. C. Arnold* for the respondent.

DECISION OF THE BOARD; April 3, 1985

1. The name of the respondent is amended to United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46.

2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent (also referred to in this decision as the Union) contrary to sections 68 and 69 of the Act. The essence of the complaint is that Union members classified as pipeline helpers have been given priority over the complainant to pipeline helper work which the complainant is qualified to perform, and that the respondent's Executive Board refused to duly consider his concerns about that matter. (For ease of reference, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, which is the respondent's parent body, will be referred to in this decision as the UA.)

3. The hearing of this complaint commenced on December 5, 1984, and continued on February 4 and 19, 1985. During those three days of hearing, the Board received 21 exhibits and heard the evidence of Raphael A. Julien, the complainant; Peter Signal, a member of the respondent's Executive Board; Sean O'Ryan, the respondent's Business Manager; and Debbie Ratcliffe, who has been the respondent's chief dispatcher since May of 1982. In making the findings of fact contained in this decision, I have considered all of that oral and documentary evidence, the submissions of the parties, my assessment of the relative credibility of the witnesses, and the inferences which may reasonably be drawn from the totality of the evidence.

4. Mr. O'Ryan was elected as the respondent's Business Manager in January of 1983. Before that he was one of the respondent's business representatives for three years. The respondent has approximately 4,500 members in various classifications, including plumbers, pipefitters, pipeline welders, pipeline fitters, and pipeline helpers. It operates a dispatching office from which it refers members to work pursuant to various collective agreement provisions. Members are also permitted to solicit jobs directly from employers in some circumstances.

5. The complainant joined the Union in 1968 as a plumber in its Organizing Division. (For a description of that division and the circumstances which gave rise to its creation, see *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada*, [1980] OLRB Rep. May 808.) As a member of the respondent's Organizing Division, the complainant was entitled to solicit work from residential (highrise) contractors. (The Union is rarely called upon to dispatch workers to projects in the residential sector as almost all of those jobs are filled by means of direct solicitation.) As a member of the Organizing Division, he was also entitled to work in other sectors of the Union, such as the ICI sector and the power sector, when there was full employment of the regular members in those sectors. He was also eligible to obtain work through other UA locals by means of a travel card.

6. On November 3, 1980, the Union dispatched the complainant to work at an Ontario Hydro construction project. After he ceased working on that job, he reported to the Union's dispatch office on February 11, 1981, at which time his name was placed on the Union's out-of-work list. On April 22, 1981, the complainant left the respondent's jurisdiction and went to work in Saginaw, Michigan, under a travel card to UA Local 85. While he was in Michigan, he received in the mail a card (from the respondent's dispatch office) advising him that there were job opportunities available within the respondent's jurisdiction, and requesting him to return to Ontario for dispatch by the respondent. However, since he was not sure how long the work would last in Ontario, he elected to remain in Michigan at that time, as he was entitled to do.

7. It is common ground between the parties that the following paragraphs from the Board's decision in *Thomas Beck*, [1985] OLRB Rep. Jan. 14, accurately describe the respondent's general hiring hall procedures:

4. The respondent operates a hiring hall pursuant to several different collective agreements relating to various sectors of the construction industry and industrial maintenance industry. Under some of those collective agreements, the hiring by employers is done entirely by way of dispatch from the respondent's hiring hall. Under the other agreements, and in particular, under the provincial agreement relating to the industrial, commercial and institutional sector of the construction industry, an employer is free to select the union members it wishes to hire,

so long as those members obtain referral slips from the respondent. The respondent's members are free to solicit employers for work, provided they obtain a referral slip from the respondent before commencing work. The respondent will also dispatch its members to jobs with employers bound by the provincial agreement for work in the industrial, commercial and institutional sector of the construction industry if such an employer calls the respondent's hiring hall for employees.

5. A register or out-of-work list is kept of unemployed members of the respondent who are listed in one of three classifications; steamfitter, plumber or welder. When a member's employment is terminated, he can register with the hiring hall. When a member is referred to a job, his name is removed from the register. However, there is a 30 day rule under which a member who is referred to a job of less than 30 days' duration does not lose his place on the list. Only the number of days actually worked by that member is added to his date of registration on the out-of-work list. The member's date of registration with the hiring hall determines the member's place on the out-of-work list.

6. The dispatcher maintains a work record card for each member of the respondent registered on the out-of-work list. . . . The dispatcher records the details of a member's employment on that card. The cards are kept in the order that the members are ranked on the out-of-work list. A duplicate set of cards are kept in the same order locked under glass so that members coming to the hiring hall can determine their ranking on the list. Daily, the dispatcher also posts a chart showing the details of hiring of the respondent's members. The chart lists the name of the member, the member's classification, the contractor, the job location, the name of the project and whether the job was obtained either by the member through direct contact between the employer and member or by dispatch from the hiring hall. . . .

7. If a contractor calls the hiring hall for employees, the dispatcher attempts to contact the members in the order that they are ranked on the out-of-work list. Any call the dispatcher makes to a member is recorded on the member's work record card. A member may refuse to accept a referral from the hiring hall without losing his place on the list. A member may also inspect his own work record card on request.

8. The work performed by pipeline helpers is generally of a labouring type which requires little skill or previous experience. Thus, almost all of the members of the respondent are capable of working as pipeline helpers, although some of that work does require an element of skill and is best performed by experienced pipeline helpers. Prior to 1981, the respondent referred some plumbers and pipefitters to work as helpers on pipeline jobs; however, many pipeline helpers were obtained directly by the contractors without a referral by the Union, or were obtained through the Union by means of name hiring at a prejob conference pursuant to the applicable collective agreement provisions. Thus, the pre-1981 practice with respect to pipeline helpers was (in the words of Mr. O'Ryan) loose at best. However, this did not give rise to any dispatching problems because prior to 1981 the position of pipeline helper was not very attractive, as there was no board allowance or pension. In that period, pipeline helpers tended to move from job to job with particular welders in order to gain an opportunity to learn the ropes with a view to eventually breaking out as journeymen.

9. In 1981 the Union was given much greater control over the pipeline helper situation when it became responsible for dispatching all pipeline helpers to pipeline jobs. At the same time, other collective agreement changes in respect of board allowance and pensions made pipeline helper work much more attractive to unemployed members.

10. In May of 1982, on the recommendation of William Weatherup, the respondent's

pipeline business representative, the membership passed a motion under which a separate list was to be posted (at the Union's dispatch office) pertaining to the following three categories: pipeline welder, pipeline fitter, and pipeline helper. By the time that motion was passed, prejob conferences had already been held in respect of the three major pipeline projects (two large main lines and a river crossing) for which the Union was required to supply workers. Welders had already been selected for dispatch to those projects, but pipeline helpers had not yet been selected. Since there was not sufficient time to set up a separate list of the type contemplated by the motion, Bill Howard, who was the respondent's Business Manager at that time, decided in consultation with Ms. Ratcliffe to select members directly from the Union's regular out-of-work list in chronological order. Of the approximately 300 Union members referred to pipeline work in 1982 in that manner, about 175 were referred as pipeline helpers. Virtually every Union member who wished to work on a pipeline project in 1982 was able to do so, as there was a lot of pipeline work available (in the respondent's jurisdiction) that year. The complainant was not one of the persons dispatched by the respondent to work on a pipeline project in 1982 as he was working in Michigan and was not available for work in Ontario until October 12 of that year. (A person who is on a travel card does not lose his position on the respondent's out-of-work list, but is not called for job referrals since he is not available for work. Thus, when the complainant returned to Ontario in October of 1982, his out-of-work date remained February 11, 1981.)

11. The normal seasonal layoff of pipeline workers began in September of 1982. As pipeline helpers (and other pipeline workers) reported to the dispatch office to register, Ms. Ratcliffe started a pipeline card system and began to compile a pipeline list in accordance with Mr. Howard's instructions to set up a separate pipeline list as soon as possible. After completing the registration of the members who had worked on pipeline projects in 1982, Ms. Ratcliffe began the arduous task of going through each of the approximately 4,500 members' cards to determine which of them had pipeline experience prior to 1982. The complainant was one of the ten or fifteen members whose previous experience as a pipeline helper was inadvertently overlooked in that process. However, that oversight did not in any way affect the complainant's job opportunities as the omission of his name from the pipeline list was promptly remedied when he brought it to Ms. Ratcliffe's attention prior to the time when the respondent received its first call for pipeline helpers in respect of the 1983 pipeline construction season.

12. In or about February of 1983, Ms. Ratcliffe approached the newly elected Mr. O'Ryan and asked him for instructions concerning the manner in which the ten members classified as pipeline helpers were to be referred to work. (This number subsequently decreased to nine when one of the pipeline helpers was expelled from the Union for non-payment of dues.) Those individuals were not eligible for referral to any other work, such as ICI or residential projects; they were only eligible to work as pipeline helpers. As indicated above, prior to 1981 the referral to work of members classified as pipeline helpers had not been a problem for the dispatch office as they had always solicited their own jobs or been name-hired by employers at prejob conferences. However, when dispatch by the Union became their sole source of work, their situation presented a problem for Ms. Ratcliffe, who was concerned that placing them on a list with hundreds of other members qualified to work as pipeline helpers (but holding other classifications) would severely restrict their work opportunities. Ms. Ratcliffe recommended to Mr. O'Ryan that the members classified as pipeline helpers be the first persons to be dispatched as pipeline helpers. In adopting that recommendation, Mr. O'Ryan proceeded by analogy to the Union's longstanding referral practice in respect of classifications. For

example, members having a metal trade classification are given first preference for metal trade referrals even though other unemployed members such as plumbers or pipefitters may be qualified to perform such work. Similarly, plumbers and other members qualified to perform steamfitting work are not referred to such work until all the members classified as steamfitters have had an opportunity to obtain work. The same is true of combustion helpers and welders. For example, the complainant, as a member with welding experience and capability, was referred to an Ontario Hydro project in May of 1979 as a welder, but he became entitled to be so referred only after the respondent had exhausted its supply of welders.

13. In explaining the fairness of making members classified as pipeline helpers the first persons to be dispatched to perform such work, Mr. O’Ryan noted that persons classified as pipeline helpers are eligible only to perform that work and, unlike the complainant, have no opportunity to perform building trades work. If those ten members were merely placed on the pipeline list with the hundreds of other members qualified to perform pipeline helpers’ work, and were sent out in rotation with all those other members, they could be without work for years when (as in 1983 and 1984) there is little pipeline work available in the respondent’s jurisdiction. In adopting that approach, Mr. O’Ryan also considered the Union’s collective agreement obligations to supply qualified men. In this regard, it was his uncontradicted evidence that the ten persons in question tend to be the Union’s best qualified pipeline helpers.

14. The introduction of that refinement received a somewhat mixed reaction from the membership. Many of the members supported it, but some of the plumbers and steamfitters who were near the top of the pipeline list were very angry about it and raised it for discussion at various Union meetings. Mr. O’Ryan responded to their objections by explaining the equity of the approach and the analogous situations from which the approach had been derived. Thus, Mr. O’Ryan stood by the decision which he had made in good faith to fulfil his responsibilities under the UA Constitution, which provides, in part, as follows:

SEC. 104. The Business Agent and/or Business Manager meets in daily contact with the public and with employer [sic], becoming the trustee of the welfare of the members of the Local Union. It is his solemn duty and obligation to vigilantly protect the trade jurisdiction of the United Association in the plumbing and pipe fitting industry of his locality; also to compel employers to observe and respect collective bargaining agreements, adjusting all grievances between members of his Local Union and their employers with justice and fairness, as well as fostering and promoting employment for the members of the Local Union.

The following interpretation has been applied by the UA General President to the duties of a local union business manager:

The duties of the Business Manager or Business Agent are specifically set forth in Section 104 of the United Association Constitution. This section sets out specific constitutional authority and power over certain important matters in conducting the affairs of a local union on a day to day basis expressly conferred upon the Business Manager.

In interpreting a constitution, we must always keep in mind that a specific provision controls the general. Thus, Section 104 in the opening sentence sets a very practical approach to the control of the daily business affairs and operations of a local union by stating that it is in the hands and control of the Business Manager, as follows:

The Business Agent and/or Business Manager meets in daily contact with the public and with the employer . . .

and it states a very important principal [sic] that by virtue of the office of Business Manager he becomes

. . . the trustee of the welfare of the members of the Local Union.

This sentence is the constitutional recognition that the daily affairs and business operation of a local union are under the control and supervision of the Business Manager, or Business Agent, who is generally a full-time paid officer, and in many instances the only full-time paid officer, of a local union. Section 104 then goes on to make specific delegation of constitutional authority and power of a Business Manager or Business Agent by stating:

It is his solemn duty and obligation to vigilantly protect the trade jurisdiction of the United Association in the plumbing and pipe fitting industry of his locality.

Further, it then states it is the duty of the Business Manager to compel employers to observe and respect collective bargaining agreements, and that a further duty of the Business Manager is

. . . adjusting all grievances between members of his Local Union and their employers with justice and fairness. . .

And a further duty:

. . . as well as fostering and promoting employment for the members of the Local Union.

Further, under Section 105, it is the responsibility of the Business Manager or Business Agent to file all collective bargaining agreements with the General Office, as well as any supplementary wage increases.

Under Section 101(b), when there is a Business Agent or Assistant Business Agent besides the Business Manager, the Business Agent or Assistant Business Agent is under the supervision and control of the Business Manager.

Thus, the full-time daily operation of a local union in all of its affairs and operations is under the control and supervision of the Business Manager by virtue of Section 104 of the UA Constitution.

This area of the daily functioning and operation of a local union by a Business Manager under Section 104 in carrying out the terms and conditions of the local union's collective bargaining agreement, including referral of men, settlement of jurisdictional disputes, enforcement of the contract, and organizing non-union contractors is specific, and thus, is controlling under the UA Constitution.

Because of these facts, many local unions provide in their constitution and bylaws that the Business Manager by virtue of his office is automatically Chairman of the Negotiating Committee and a delegate from the local union to the Building Trades Council and Central Body, and to all conventions to which the local union is entitled to delegates.

The selection of other members of the Negotiating Committee is [sic] some cases is determined by election, and in other cases by appointment. The procedure for appointment varies from local to local and area to area, depending on what is worked out in a democratic fashion in the best interest of the membership.

There should be no question that, because of the duties and responsibilities of the Business Manager of a local union, he should be a member of, and head of, the Negotiating Committee.

Marvin J. Bode

General President, UA

[Emphasis added]

15. In exercising his constitutional responsibilities, Mr. O’Ryan, in consultation with other Union officials and Ms. Ratcliffe, decided that since virtually all of the members who were interested in working on pipeline projects within the respondent’s jurisdiction in 1982 had done so, they would be placed on the pipeline list in chronological order (based upon the respective dates on which they registered at the dispatch office following their layoffs in the fall of 1982). Members who had prior pipeline experience but who did not work on a pipeline project in the respondent’s jurisdiction in 1982 were placed on the list after them, followed by members who subsequently expressed interest in obtaining pipeline work but who had no previous pipeline experience. In deciding to place members who worked on pipeline jobs in the respondent’s jurisdiction in 1982 higher on the list than members with earlier experience, Mr. O’Ryan concluded, not unreasonably, that those members who had demonstrated a continued interest in pipeline work in 1982 by accepting a referral by the respondent to a pipeline job that year should be referred to pipeline jobs in 1983 in advance of those with prior experience who had not demonstrated such continued interest, in that they had not availed themselves of the plentiful opportunities to work on pipeline projects in the respondent’s jurisdiction in 1982. The complainant was not dispatched to pipeline work in 1983 because there was relatively little pipeline work available in the respondent’s jurisdiction that year. Thus, his name was not reached on the out-of-work list. He was not dispatched to any other work that year because the high level of unemployment in the ICI sector and in some of the other sectors of the Union resulted in the complainant not being entitled to be dispatched to any such work. As noted above, there are almost no referrals in the residential sector since virtually all of that work is obtained by direct solicitation by members. However, it was Mr. O’Ryan’s evidence that employment prospects in the residential (highrise) sector have been excellent since mid 1982 and that, as a member of the Union in its Organizing Division, the complainant could have solicited work in that sector. Thus, the complainant had employment opportunities available to him which were not available to the respondent’s members classified as pipeline helpers.

16. In the summer of 1983, the following notice was posted in the respondent’s dispatch office:

RE: PIPELINE DISPATCHING PROCEDURE

General Rules

1. All classifications of the pipeline (welder, journeyman and helper) are dispatched according to the same procedure.
2. If a member is working, either for a Local Contractor or on another pipeline, he will not be contacted for this job.
3. If a member is on Travel Card, the Dispatch Office will try to contact the member. If that is impossible, he will be by-passed.

Procedure:

1. The first date of importance is the sign-in date of the member from his last mainline pipeline job. The Dispatch Office then calculates the number of days unemployed, from that date until present.
2. The second date of importance is the sign-in date of the member on the Out-of-Work board. The Dispatch Office then calculates the number of days unemployed, from that date until present.
3. The two ‘number of days unemployed’ are then added together. (i.e. Pipeline – 300 days unemployed. Out-of-Work board – 150 days unemployed. Total – 450 days unemployed.)

4. The list is then compiled, starting with the member who has the most total days unemployed.

Sean O'Ryan
Business Manager,
Local Union 46.

That procedure was arrived at by Mr. O'Ryan and the Union's business representatives, in consultation with Ms. Ratcliffe. It reflects the fact that an overwhelming majority of the respondent's members who work on pipeline projects also work in the ICI sector and in other sectors. By providing for two numbers of days unemployed to be added together – a process referred to in the evidence as correlation – Mr. O'Ryan eliminated the anomaly which would result if only the date last worked on a pipeline job were taken into account; if that approach were adopted, a member who ceased work on a pipeline project on October 1st and remained unemployed throughout the winter would be lower on the pipeline list than a member who ceased pipeline work on September 30 but then worked for several months (or throughout the winter) on residential or ICI projects. In the case of members who worked on pipeline projects in the respondent's jurisdiction in 1982, their respective sign-in dates from their last pipeline job were used in correlating their position on the pipeline list. In the case of members who had not worked on a pipeline project in 1982 but who had previous pipeline experience in the respondent's jurisdiction, January 3, 1983 was used. That date, which was the first working day in 1983, was suggested by Ms. Ratcliffe and adopted by Mr. O'Ryan in order to position such members above members with no previous pipeline experience, but below members who had demonstrated their continued interest in pipeline work by working on a pipeline project in the respondent's jurisdiction in 1982. Persons without previous pipeline experience who subsequently visited or telephoned the dispatch office to express interest in pipeline work were given the date on which they expressed such interest as their pipeline sign-in date.

17. After the decision was made to use a correlation system for making pipeline referrals in 1984, it took Ms. Ratcliffe about two months to prepare a new pipeline list. Each time she is required to update that list, Ms. Ratcliffe requires a further month to prepare new correlations. It is her hope that this time can be substantially reduced in the future by placing the pipeline list on cards under glass.

18. In the spring of 1984, the complainant, who had worked as a pipeline helper in 1980, became concerned that he had not been referred to work even though pipeline work had started to pick up. When he approached Ms. Ratcliffe and learned from her that there were nine members classified as pipeline helpers who were the first persons being dispatched on pipeline helper referrals, he wrote to the respondent's Executive Board to express his concern. In that letter dated May 24, 1984, the complainant expressed the opinion that he was being black-listed, and requested an opportunity to meet with the Executive Board and the Business Manager. In response to that request Union Secretary-Treasurer Thomas Russell advised the complainant (by letter dated June 15, 1984) that he could meet with the Executive Board at their meeting on Wednesday evening July 4. At that meeting, Peter Signal told the complainant, who had appeared before the Executive Board several times before, that the Executive Board was fed up with [his] frivolous complaints. He also told the complainant that if he had a complaint against a Union official such as Mr. O'Ryan, he should lay charges against him. At that meeting Mr. Signal also told the complainant that there were thousands of members out of work and that he was no different from the others.

19. Mr. O'Ryan was not in attendance at the Executive Board meeting as his presence was required at a joint officers' committee meeting which was being held concurrently in

relation to important matters pertaining to Ontario Hydro. Although he advised the Union Vice-President that he could be called into the Executive Board meeting if there was any business which required his presence, he was not called in because the Executive Board members were of the view that if the complainant wished to impugn the actions of Mr. O’Ryan, he should do so by laying specific charges against him under the UA Constitution. However, the complainant elected not to do so.

20. While it might well have been prudent for the Executive Board to have dealt with the complainant’s concerns more diplomatically than they did, I am not persuaded that their treatment of him on the evening in question contravened section 68 of the Act, as contended by complainant’s counsel. In this regard, it is well established in the Board’s jurisprudence that for the Board to find a breach of section 68 of the Act, the Union’s impugned actions must involve the representation of a bargaining unit employee in relation to his or her employer. See, for example, *Angelo Moro*, [1983] OLRB Rep. Aug. 1354, at paragraph 3, in which the Board wrote, in part, as follows:

. . . The Board has consistently ruled in past decisions, that the duty of fair representation in section 68 is concerned only with the representation by a trade union of an employee in relation to his or her employer.

(See also *Ronald Lewszoniuk*, [1984] OLRB Rep. Jan. 48; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; and *Frank Manoni*, [1981] OLRB Rep. Dec. 1775.)

21. There remains, however, the question of whether the respondent, through Mr. Signal, contravened section 69 of the Act at the meeting in question. In *Maurice Berlinguette*, [1984] OLRB Rep. April 568, the Board noted (in paragraph 13) that the phrase ‘engaged in the selection, referral, assignment, designation or scheduling of persons to employment’ describes the sort of trade union to which section 69 applies, but does not limit the acts to which that section applies. In that decision, the Board also wrote (in paragraph 15): The language and history of section 69 suggests that the actions with which that section is concerned must be actions analogous (at least so far as the analogy can be drawn) with actions to which section 68 is directed: actions and matters affecting the employment of persons the union represents. Since the subject matter of the complainant’s letter of May 24 was his concern about the fact that members classified as pipeline helpers were being referred to work ahead of him, it is arguable that the manner in which the Executive Board dealt with those concerns falls within the ambit of section 69. However, it is unnecessary to decide that matter (which was not argued by counsel) in the present case. Assuming without deciding that the words and actions of Executive Board members such as Mr. Signal are open to scrutiny by the Board under section 69 in such circumstances, I am not convinced that the complainant has established any entitlement to relief in that regard. Although (as noted above) it might well have been prudent for the members of the Executive Board to have dealt with the complainant’s concerns more diplomatically than they did, there is no evidence before me which indicates that Mr. Signal was inaccurate in characterizing the complainant’s previous complaints to the Executive Board as frivolous. More importantly, it is clear from the evidence as a whole that the Executive Board was not denying the complainant an opportunity to have his concerns addressed, but rather was advising the complainant that if he wished to question the propriety of the Business Manager’s actions, he should do so by laying charges against him under the UA Constitution. While that approach might reduce the likelihood of obtaining an informal resolution of a member’s concerns in some circumstances, it is unlikely that any

such resolution would have been possible in this case in any event as notwithstanding various overtures by Mr. O’Ryan, the complainant has refused to even speak to him since 1981, when the complainant was discharged by Ontario Hydro for assaulting a fellow worker and the Union decided not to refer his discharge grievance to arbitration. (The Union’s actions in that regard formed the subject matter of an earlier complaint before this Board (File No. 1641-81-U.) That complaint was dismissed by the Board, differently constituted, in an unreported decision dated April 6, 1982.) Even if Mr. Signal’s comments at the Executive Board meeting could be found to constitute a breach of section 69 by the respondent, no remedial relief would be necessary or appropriate as the complainant has not established that he suffered any loss or prejudice as a result of those comments. As noted above, instead of filing charges as suggested by Mr. Signal, the complainant elected to file the instant section 89 complaint in respect of what he considered to be an arbitrary or discriminatory failure to refer him to pipeline helpers’ work prior to June 21, 1984. However, for the reasons set forth in this decision, I am of the view that there is no merit in that complaint. I am also satisfied that if the members of the Union Executive Board had considered his allegations, they would in all probability have come to the same conclusion.

22. When an updated pipeline list was prepared in June of 1984, the application of the correlation approach described above resulted in the complainant’s name being third on the pipeline list. On June 21, 1984, the Union dispatched the complainant to a job as a pipeline helper. The complainant continued to work on that job until August 7, 1984, when he registered on the out-of-work list after quitting that job. It is the complainant’s contention that he was only dispatched to that job because of his letter of May 24, 1984 to the Executive Board. However, it is clear from the evidence that there is no substance whatsoever to that allegation. The complainant was dispatched to that job on June 21 because each of the nine members classified as pipeline helpers, and the two members whose names were above him on the pipeline list, had already been called for dispatch purposes. Thus, it was the complainant’s turn to be dispatched. Moreover, I accept without hesitation or reservation the candid and credible evidence of Ms. Ratcliffe that she made that referral on her own without any interference from Mr. O’Ryan or anyone else, and was unaware at the time of that referral that the complainant had written the aforementioned letter to the Executive Board.

23. In 1983 a new By-laws Committee was activated by the respondent’s officers. That Committee embarked upon the task of drafting a comprehensive by-law regarding the Union’s hiring and dispatching procedures. In addition to a notice from the Chairman of the By-laws Committee requesting written input from the membership, the following notice was prominently displayed in the June 1983 edition of the respondent’s monthly newsletter, *The Trade Wind*:

**NOTICE TO
LOCAL 46 MEMBERS**

Presently the By-Laws Committee is formulating a By-Law governing the dispatching system. Included in their task of structuring the By-Law they will correlate the various Resolutions adopted and passed by the membership of Local 46.

Recently a Resolution was passed by the membership pertaining to the dispatching of men to the Mainline Pipeline sector. Clarification is needed in respect to the present Pipeline Helper’s list. Therefore, until a By-Law formalizes the dispatching of men to this sector, any member

of Local 46 wishing to have his name placed on the Pipeline Helper list may do so by submitting his name and card number to the Local Union Dispatch Office.

Fraternally yours,

Sean O’Ryan,

Business Manager,

Local Union 46.

Since that time, the By-laws Committee has met approximately once a month in respect of by-laws concerning the Union’s hiring and dispatching procedures. A proposed by-law covering various aspects of the respondent’s referral procedures has been published in *The Trade Wind* and considered at a special called Union meeting in the fall of 1984. Some parts of the proposed by-law were passed by the membership, other parts were referred back to the By-laws Committee for further consideration, and other parts had not yet been considered as of February of 1985, due to time constraints. Detailed consideration of the pipeline helpers’ referral system awaits the completion of the Committee’s and the membership’s deliberations concerning other aspects of the Union’s dispatching procedures.

24. In the summer of 1984 the complainant became a member of the Union’s General Membership Division. In doing so, he took advantage of changes introduced in February of 1984 by which it became easier for experienced plumbers and steamfitters to transfer from the Organizing Division to the General Membership Division. Thus, he became eligible for referrals to ICI projects. However, employment prospects in the ICI sector in 1984 were rather bleak due to the depressed state of that sector. Thus, the complainant had not become eligible for any job referrals in the ICI sector during the period covered by this complaint.

25. In his submissions to the Board, counsel for the complainant contended that a person such as the complainant who has worked to upgrade his qualifications and skills should have the same entitlement to pipeline helpers’ work as persons classified as pipeline helpers. While that approach is not without merit, it does not follow that a failure to adopt such approach contravenes section 69 of the Act. In the present case, Mr. O’Ryan, in fulfilling his responsibilities under the UA Constitution (as interpreted by the UA General President) pending a review and consolidation of the Union’s job referral practices and procedures by its By-laws Committee, decided in good faith, after duly considering the various competing interests, that as a matter of fairness and equity, the Union members classified as pipeline helpers should be referred first, before pipeline helpers’ work was offered to members in other classifications. In adopting that approach, Mr. O’Ryan was proceeding by analogy to established referral practices within the Union (as described above). Having regard to all of the circumstances, I am satisfied that neither the adoption of that approach nor the manner in which it was implemented contravened section 69 (or any other provision) of the Act. As the Board noted in *John Cooper*, [1984] OLRB Rep. Jan. 6, at paragraph 38:

. . . The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at a particular time. In so doing, he may well make an honest mistake. But the question is not whether the business manager (and, vicariously through him the union) may have erred in some way or made a decision of which this Board, with hindsight disapproves. Business agents, being human, will

make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused – for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss*, [1983] OLRB Rep. July 1160). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was arbitrary and illegal. The term arbitrary in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations.

(See also *Thomas Beck*, *supra*.)

26. There is also no merit in the complainant's contention that he should be entitled to be referred to pipeline helpers' work in preference to the pipeline helpers who joined the Union after he did, as it is clear from the evidence that referrals proceed on the basis of classification and length of time out of work, not on the basis of length of time in the Union. Thus, as noted by Ms. Ratcliffe in her testimony before the Board, although the complainant is qualified to perform welding work, a welder who joined the Union in 1984 would be dispatched to a welding job in advance of the complainant, regardless of when the complainant joined the Union, because the complainant is classified as a plumber, not as a welder. I am also satisfied that this longstanding practice does not contravene section 69 of the Act.

27. Having regard to all of the evidence and the submissions of the parties, I have concluded that the complainant has not established that the respondent has acted in a manner that is arbitrary, discriminatory, or in bad faith within the meaning of sections 68 or 69 of the *Labour Relations Act*.

28. For the foregoing reasons, this complaint is hereby dismissed.

1482-84-R Sheet Metal Workers International Association, Local Union 504, Applicant, v. **Mechanical Insulations Roofing & Siding Ltd.**, Respondent, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervener

Bargaining Unit – Construction Industry – Certification application with respect to sheetmetal workers – *Apprenticeship and Tradesmen's Qualification Act* prohibiting non-certificate holders from working in certified trades – Unit described as journeymen sheetmetal workers and registered sheetmetal apprentices to exclude persons not qualified in certified trade of sheetmetal work

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *L. Collins* and *J. Wilson*.

APPEARANCES: *L. Steinberg* and *A. Moore* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; April 29, 1985

1. The name of the applicant is amended to read: Sheet Metal Workers International Association, Local Union 504.

2. The applicant has applied for certification with respect to a bargaining unit of all sheet metal workers employed by the respondent, and working in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman. All sheet metal workers employed by the respondent, and working in Board area 21, save and except non-working foremen and persons above the rank of non-working foreman and persons employed in the I.C.I. sector of the construction industry.

3. The intervener filed an intervention in order to ensure that its bargaining rights were not affected. Subsequently, the intervener withdrew its intervention. In the circumstances of this application, the intervention is withdrawn by leave of the Board.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629 of the Sheet Metal Workers' International Association.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency, on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. The respondent in its reply agreed with the bargaining unit proposed by the applicant and filed a list of employees on Schedule A which contained thirteen names and a Schedule D which contained one name. The applicant challenged the lists of employees filed by the respondent and adopted the position that Art Belanger, Randy Fiddes, Percy McKay, Chris O'Brien, Dave Stadnyk and Russ Walls were outside the bargaining unit. The Board appointed a Labour Relations Officer to inquire into and report to the Board on the list and composition of the bargaining unit.

7. This application for certification is with respect to sheet metal workers. The *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, c.24 provides in section 11 as follows:

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

By virtue of Regulation 57 of R.R.O. 1980 under the *Apprenticeship and Tradesmen's Qualification Act*, the trade of sheet metal worker has been designated as a certified trade for the purposes of that Act.

8. The Report of the Labour Relations Officer has been considered by the Board. Art

Belanger, Randy Fiddes, Percy McKay, Chris O'Brien, Dave Stadnyk and Russ Walls were employees of the respondent on September 7, 1984, the date of the filing of this application. They were engaged in a variety of tasks and performed varying amounts of work which may be regarded as work which is within the trade of a sheet metal worker. None of these employees possessed a certificate of qualification for the certified trade of sheet metal work and none of them was a holder of a certificate of apprenticeship in the trade of sheet metal worker.

9. In *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594, the Board pointed out that the *Apprenticeship and Tradesmen's Qualification Act* contains certain limiting provisions. By virtue of the provisions of section 11 of the Act, no person shall work or be employed in a certified trade, such as sheet metal worker, unless he holds a subsisting certificate of qualification in the certified trade or holds a certificate of apprenticeship in the trade or satisfies the Director of Apprenticeships under the provisions of section 11(4). In the instant case, it is clear that Art Belanger, Randy Fiddes, Percy McKay, Chris O'Brien, Dave Stadnyk and Russ Walls are not entitled under the provisions of that Act to be employed or work in the certified trade of sheet metal worker. Section 26 of that Act states that every person who contravenes any provision of the Act is guilty of an offence and on conviction is liable to a fine of not more than one thousand dollars. In *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*, the Board concluded that the appropriate bargaining unit for collective bargaining ought to be defined so as to reflect the designation of the trade of sheet metal worker as a certified trade. Regulation 57 of R.R.O. 1980 under the *Apprenticeship and Tradesmen's Qualification Act* refers to journeymen and apprentices. The Board in that case decided that the appropriate bargaining unit ought to be described in terms of journeymen sheet metal workers and registered sheet metal apprentices and should not include persons who were not qualified as sheet metal workers under the *Apprenticeship and Tradesmen's Qualification Act*. In our opinion that approach is equally applicable in the instant application. Moreover, in *C T Windows Limited*, [1983] OLRB Rep. May 627, the Board emphasized the recognition to be given to such compulsorily certified trades such as, sheet metal worker, air-conditioning, refrigeration, plumbing and steamfitting and electrical. In addition, the Board pointed out that where it was dealing with a trade where certification of a tradesman was a voluntary matter, as in the case of glaziers, the concern expressed in *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*, did not apply.

10. In the instant application the applicant requested that the description of the proposed bargaining unit be amended to read journeymen sheet metal workers and registered sheet metal apprentices. In the circumstances of this application, the Board is prepared to grant this request. The Board finds that all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board finds that Bill Callaghan, Gary Cudney, Yvon Gervais, Peter Kelly, Charlie McKay, Manuel Pereira and Mike Slawson are properly included in the bargaining unit. In applications for certification which are filed under the construction industry provisions of the *Labour Relations Act*, the Board includes for the purpose of the count only those persons

who were at work on the date of the making of the application. Accordingly, the person whose name appeared on Schedule D is not included for the purpose of the count. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 18, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 4 above in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

13. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

3048-84-R Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, Applicant, v. **The Metropolitan General Hospital**, Respondent, v. Thomas A. Hebert, Employee/Objector

Certification – Practice and Procedure – Dispute whether employees already represented – Employee objector having status to challenge list of employees – Entitled to notice and participation in hearings

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *W. H. Wightman* and *S. O'Flynn*.

APPEARANCES: *Edward R. Durham* for the applicant; *Ross E. Graham* for the respondent; *Thomas A. Hebert* on his own behalf.

DECISION OF THE BOARD; April 10, 1985

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. In its application, the applicant described the unit of employees for which it seeks certification in this application as follows:

All employees of Metropolitan General Hospital at Windsor, Ontario, who are regularly employed for not more than 24 hours per week, save and except Professional Medical Staff, Graduate Nursing Staff, Under Graduate Nurses, Graduate Pharmacists, Under Graduate Pharmacists, Graduate Dieticians, Under Graduate Dieticians, Technical Personnel, Stationary Engineers, Supervisors, Foremen, persons above the rank of Supervisors or Foremen, Office Staff, Chief Engineer, and persons covered by subsisting collective agreements.

In its Reply, the respondent claimed that the following was the appropriate description:

All employees of The Metropolitan General Hospital, at Windsor, Ontario, who are regularly employed for not more than twenty-four (24) hours per week, save and except professional medical staff, registered nurses, undergraduate nurses, graduate pharmacist, graduate dietitians, student dieticians, technical personnel, registered nursing assistants, ward clerks, supervisors and persons above the rank of supervisors, office staff, engineers and boiler house employees working under the supervision of the chief engineer, and persons covered by other subsisting collective agreements.

For the purposes of clarity Technical Personnel shall mean qualified physiotherapists and occupational therapists, psychologists, electroencephalographists, electrical shock therapists and qualified laboratory, radiological, pathological and cardiological technicians and students that are taking courses at the Hospital to obtain a diploma or its equivalent, to qualify them as a technician as mentioned in this subsection.

In their meeting with an Officer of the Board prior to the hearing in this matter, the applicant and respondent agreed that the appropriate bargaining unit for the purpose of this application should be described as follows:

all employees of the respondent at Windsor, Ontario, regularly employed for not more than 20 hours per week, save and except professional medical staff, registered nurses, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, registered nursing assistants, ward clerks, supervisors, persons above the rank of supervisors, office staff, engineers, boiler house employees working under staff the supervision of the chief engineer and persons covered by other subsisting collective agreements.

For purposes of clarity, it is hereby agreed that the term technical personnel shall mean qualified physiotherapists and occupational therapists, psychologists, electroencephalographists, electrical shock therapists and qualified laboratory, radiological, pathological, and cardiological technicians and students who are taking courses at the hospital to obtain a diploma or its equivalent, to qualify them as a technician.

5. The applicant and respondent are parties to a collective agreement dated October 13, 1982, with effect from April 1, 1982 to March 31, 1984, which will be referred to in this decision as the expired service unit agreement. It is common ground that the appropriate notice to bargain was given at the end of this agreement's term, that the parties underwent conciliation with respect to the negotiation of that agreement and that the terms of the renewal agreement were the subject of an outstanding interest arbitration at the time this application was filed. Article 2.01 of that agreement provides:

ARTICLE 2 – RECOGNITION

2.01 (a) The employer recognizes the Union as the sole bargaining Agent for all employees of the Employer, save and except professional medical staff, registered nurses, under-graduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, registered nursing assistants, ward clerks, supervisors and persons above the rank of supervisors, office staff, engineers and boiler house employees working under the supervision of the Chief Engineer, persons regularly employed for not more than twenty (20) hours per week and persons covered by other subsisting collective agreements.

(b) For the purposes of clarity, it is hereby agreed that the term technical personnel shall mean qualified physiotherapists and occupational therapists, psychologists, electroencephalographists, electrical shock therapists and qualified laboratory, radiological, pathological and cardiological technicians and students who are taking courses at the hospital to obtain a diploma or its equivalent, to qualify them as a technician as mentioned in this subsection.

In order to determine who were the persons covered by other subsisting collective agreements referred to in this Article, it is necessary to consider the respondent's position on October 13, 1982. The representative of the respondent advised us there were five such agreements at that time, and the information he provided with respect to those agreements may be summarized as follows:

<u>Effective Date of Agreement</u>	<u>Trade Union</u>	<u>Bargaining Unit</u>
September 30, 1982	Ontario Nurses Association	Nurses
April 1, 1982	CUPE Local 1124	RNA's, Pharmacy porters and one or two other classifications
September 1, 1982	IBEW Local 636	full-time clerical workers
July 1, 1982	SEIU Local 210	laboratory and diagnostic imagining technicians
January 1, 1982	CUOE Local 100	boilerhouse employees

Since October 13, 1982, the IBEW Local 636 has been certified to represent clerical employees regularly employed for less than twenty-four hours per week.

6. The expired service unit agreement makes special provision for employees whose job classifications are included in the within Agreement but who work (20) hours or more per week but less than full-time which are referred to explicitly as half-time employees. The agreement has appended to it a copy of a letter which purports to deal with the employment of persons on a temporary basis for a term certain to replace bargaining unit employees to whom a long term leave of absence has been granted. The letter withholds from such temporary hires a number of rights which they might otherwise have under the collective agreement. Although the letter does not expressly do so, the representatives of the applicant and respondent present at the hearing before us were both of the opinion that the letter had the effect of excluding such temporary hires from the scope of the agreement's recognition clause.

7. The representatives of the applicant and respondent took the position that the description of the appropriate unit for the purpose of this application should mirror the description in the expired service unit agreement referred to in paragraph 5. They were both of the view, at least at the outset, that the description upon which they had agreed in their meeting with the officer would accomplish that result. The employee objector drew to the Board's attention the provisions of that collective agreement which made special and different provision for half-time employees and temporary hires. His submissions introduced a third category – casuals – which he claimed the union had failed to represent notwithstanding that such persons often work more than 20 hours per week. Mr. Hebert averted to the Board's usual practice of drawing a line between full-time and part-time bargaining units at the level of regular employment for twenty-four hours per week, and suggested that what the Board

ought to do in defining the appropriate unit in this application was to redefine the unit established by the aforesaid agreement so that the line between the two would correspond with the Board's usual practice. He submitted we would have the jurisdiction to do so either under section 6 or under section 91. We ruled orally that, in the circumstances of this case, section 61(2) prevented our dealing in this application with the representation of employees for whom the applicant had bargaining rights under the expired service unit agreement and, further, that the powers outlined in section 91 of the Act had no application to the circumstances of this case. We concluded that we could only deal with representation of employees left unrepresented under the aforesaid agreement, and ruled that in fixing the bargaining unit description in this application we would seek to ensure that no employee performing work of the nature performed by employees covered by the expired service unit agreement would be left excluded both from that agreement and from the bargaining unit fixed in this application.

8. The Board then ruled that the unit of employees of the respondent appropriate for collective bargaining for the purpose of this application would be described as:

all employees of the respondent at Windsor, Ontario, regularly employed for not more than twenty (20) hours per week, together with all employees, *if any*, excluded from the scope of the recognition granted by the respondent to the Service Employees Union, Local 210, in an agreement dated October 13, 1982, by reason of the effect of a letter dated October 13, 1982 on the subject of temporary replacements for a term certain which is appended to and forms part of the aforesaid agreement, save and except professional medical staff, registered nurses, under-graduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, registered nursing assistance, ward clerks, supervisors and persons above the rank of supervisor, office staff, engineers and boiler house employees working under the supervision of the Chief Engineers, and persons employed in bargaining units for which any trade union had existing bargaining rights as of February 12, 1985.

For the purpose of clarity, the phrase technical personnel will be taken as having the meaning assigned to it in Article 2.01(D) of the expired service unit agreement.

In the course of our ruling we noted, and wish to confirm here, that our reference in this bargaining unit description to persons described in the aforesaid collective agreement as temporary hires should not be taken as an adjudication that the applicant trade union does not already have bargaining rights (or obligations) with respect to those persons by virtue of the provisions of the aforesaid collective agreement. It was and is not at all clear from the language of that agreement that the letter dealing with temporary replacements had the effect of excluding from the scope of the recognition clause persons who would otherwise fall within its scope. The fact that a trade union agrees that certain persons may be treated in a manner radically different from others whom the trade union has the right to represent does not necessarily relieve that trade union of either the right or the obligation to represent those persons: see, *Consolidated Fastfrate Limited*, [1984] OLRB Rep. May 691. It may or may not be necessary for the Board to determine whether temporary hires are employees in a bargaining unit for which the applicant already has bargaining rights in the course of dealing with this certification application. Our reference to such persons in the description of the unit of employees appropriate for this application is intended only to ensure that such persons are included in that bargaining unit if it is found, here or elsewhere, that they are excluded from the unit already represented by the applicant.

9. In order to determine whether the applicant is eligible for certification without a

vote or entitled to have a representation vote conducted, we must determine what persons were employed in the relevant bargaining unit on the date of the application. The employer has filed a list of employees who it says were employed in that unit on the application date. Both the applicant and Mr. Hebert had an opportunity to examine that list. While the union makes no challenge to its contents, Mr. Hebert asserts that there are on that list a number of persons who could not be described as regularly employed for not more than twenty (20) hours per week. We asked the representatives of the applicant and respondent what they understood the words regularly employed for not more than twenty (20) hours per week to mean. It became apparent that each of them had a unique definition or test by which he would determine whether an employee fell within the scope of the existing collective agreement. The employer's test did not turn at all on the number of hours worked by an employee. The union's test, which was quite different from the employer's test, would exclude persons who would be regarded as regularly employed for more than twenty (20) hours per week on the ordinary tests applied by this Board and, it appears to us, the tests ordinarily applied by arbitrators in interpreting the words regularly employed in relation to a pattern of hours worked. On the basis of the representations made by the representatives of the employer and the union, it became apparent to us that the lists filed by the employer might well include the names of persons whom, it could be argued, fell within the scope of the applicant's existing bargaining rights.

10. The applicant's representative took issue with Mr. Hebert's right to challenge the employer's list. He said Mr. Hebert's right to challenge the list was limited to a challenge to his own position on the list. In the ensuing discussion, it became apparent that the trade union and employer could not agree whether Mr. Hebert would fall within the unit applied for or the unit already represented by the applicant. Mr. Hebert's position was that he opposed representation by the applicant.

11. The Board ruled that Mr. Hebert, as an employee affected by this application, had the right to oppose it and in so doing to insist that the persons whose wishes are considered in testing the applicant's right to represent any bargaining unit in which he may be included are limited to the persons employed in that unit and do not include persons for whom the trade union already has bargaining rights. Mr. Hebert has the right to receive notice of and to participate in these proceedings unless and until it is determined conclusively that he does not fall within the bargaining unit affected by the application. As to the right of employees to intervene in certification proceedings see *Tektron Equipment Corporation*, [1983] OLRB Rep. Nov. 1932 and the cases cited therein.

12. Having regard to the Board's ruling that Mr. Hebert had status to challenge the employer's list and having regard to the lateness of the day, the representatives of the applicant and respondent agreed it would be appropriate for the Board to appoint a Labour Relations Officer to deal with that issue. Accordingly, the Board hereby appoints a Labour Relations Officer to inquire into and report to the Board on the list of employees filed by the respondent in connection with this application. Without in any way limiting the scope of the aforesaid inquiry, we direct that the Officer inquire into and report to the Board on the number of hours worked by each employee allegedly employed in the bargaining unit on the date of the application during each of the seven consecutive weeks immediately proceeding that date. Of course, each of the parties, including Mr. Hebert, will be entitled to introduce before the Officer any other evidence arguably relevant to a determination whether any person is correctly alleged to have been employed in the aforesaid bargaining unit on the date of this application.

The officer's inquiry will be conducted in Windsor unless all parties agree otherwise. The appropriate venue for any further Board hearing may be the subject of written representations directed to the Registrar if and when any further oral hearing by the Board is requested or becomes necessary.

13. The matter is referred to the Registrar.
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3382-84-U; 3396-84-U Brewery, Malt and Soft Drink Workers, Local 304, and Canadian Union of Brewery and General Workers 325, Applicant, v. **Molson Ontario Breweries Limited**, Carling O'Keefe Transport Limited, Carling O'Keefe Breweries of Canada Limited, and Harry F. Weininger, Respondents

Duty to Bargain in Good Faith – Lockout – Unfair Labour Practice – Memorandum resulting from industry-wide bargaining made conditional upon ratification by every unit – Whether Board striking down as unlawful – No collective agreement resulting for any unit where condition not met – Continuation of lockout of employees in all units not unlawful – Unions not entitled to receive offer made in industry bargaining where reverting to local bargaining

BEFORE: *Robert D. Howe*, Vice-Chairman.

APPEARANCES: *P. J. Cavalluzzo* for Brewery, Malt and Soft Drink Workers, Local 304; *Martin Levinson* and *G. Greco* for Canadian Union of Brewery and General Workers 325; *Keith Billings*, *Martin Addario* and *Larry Bertuzzi* for the respondents.

DECISION OF THE BOARD; April 11, 1985

1. In a decision dated March 22, 1985 in respect of these consolidated applications for relief under section 93 of the *Labour Relations Act*, the Board wrote, in part, as follows:

4. Having regard to all of the evidence and the submissions of the parties, the Board, for reasons which will issue at a later date, finds that the corporate respondents' continuing lock-out of the employees represented by the respective applicants is not unlawful. Accordingly, these applications are hereby dismissed.

The Board adopted the approach of issuing the bottom line with reasons to follow, at the request of counsel, in view of the urgency of the situation, which involved a continuing lock-out of approximately 4,000 employees. The purpose of this decision is to provide the reasons for the dismissal of the applications.

2. At the March 21 hearing of these applications, the Board received 24 exhibits and heard the evidence of Greg Greco, the President of the applicant Canadian Union of Brewery and General Workers [Local] 325 (referred to in this decision as Local 325 for ease of reference); Cameron Nelson, a lawyer who is the Business Agent of the applicant Brewery, Malt and Soft Drink Workers, Local 304 (Local 304); J. W. Healy, a lawyer who was the

breweries' chief spokesman in negotiations prior to 1983; and Larry Bertuzzi, a lawyer who has been the breweries' chief spokesman in collective bargaining since 1983. In making the findings of fact contained in this decision, I have considered all of that oral and documentary evidence, the submissions of the parties, my assessment of the relative credibility of the witnesses, and the inferences which may reasonably be drawn from the totality of the evidence.

3. Local 325, which is the successor of Local 325 of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (the Brewery Workers), holds bargaining rights for employees of the respondent Carling O'Keefe Breweries of Canada Limited (Carling) in Toronto (Rexdale). Local 304 holds bargaining rights for employees of the respondent Molson Ontario Breweries Limited (Molson) in Toronto, for employees of the respondent Carling O'Keefe Transport Limited (Transport) in Toronto, and for employees of Labatt's Ontario Breweries, Division of Labatt Brewing Company Limited (Labatt's) in Toronto.

4. Prior to December of 1984, Local 304 was a local of the Brewery Workers. On December 20, 1984, the Brewery Workers purported to place Local 304 under trusteeship and, on the following day, Local 304 purported to complete the steps which it had been taking to disaffiliate itself from the Brewery Workers. The legality of that trusteeship has been challenged by Local 304 in the Courts and before this Board. (See *Diversey Wyandotte Inc.*, [1985] OLRB Rep. Mar. 405.) However, neither the legality of the trusteeship nor the disaffiliation is material to the disposition of the instant section 93 applications.

5. Since the mid 1950's (with the exception of the period from 1973 to 1978), the major Ontario breweries have engaged in industry bargaining with the various unions which represent their respective employees. Prior to 1971 that bargaining generally culminated in a memorandum of agreement (signed by representatives of the employers and representatives of the unions) which provided for ratification by a simple majority. Thus, if the settlement was rejected by any local or bargaining unit, it would nevertheless be binding on all parties (including that local or bargaining unit) provided that a majority of all the employees voting in the ratification vote had voted in favour of it. In the 1971 negotiations, that ratification formula was replaced by a system under which the memorandum required ratification by each bargaining unit (and employer). Thus, the employees in any of the bargaining units covered by the memorandum were given what amounted to a power to veto the settlement.

6. In 1974, a dispute between the Canadian locals of the Brewery Workers and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America resulted in a situation in which the breweries were able to quickly obtain three-year agreements through separate bargaining on the basis of a pattern settlement. In 1977, the breweries made an offer within the parameters established by the (federal) anti-inflation legislation which was in force at that time. Although a settlement was reached, a collective agreement was not signed due to difficulties associated with that legislation.

7. In 1978, Mr. Nelson was one of three co-spokespersons for the unions in industry bargaining with the breweries. Those negotiations culminated in a memorandum of agreement which contained the following ratification clause:

It is further understood and agreed that this memorandum is contingent upon its ratification and adoption by each and every bargaining unit that is a party hereto.

During that set of negotiations, neither Mr. Nelson nor any other union representative raised any suggestion that a ratification clause of that type could not legally be included in a memorandum of agreement. In 1980, Mr. Nelson was again one of the three co-spokespersons for the unions in industry bargaining with the breweries. Those negotiations culminated in a memorandum of agreement, dated March 25, 1980, which contained the following ratification clause (which is identical to the one which gave rise to the present proceedings):

It is further understood and agreed that this memorandum is contingent upon its ratification and adoption by each and every Ontario bargaining unit and company that is a party hereto.

As in the previous set of negotiations, that clause was included in the memorandum of settlement without any objection to its legality by Mr. Nelson or any other union representative.

8. Prior to the onset of negotiations in 1982, Mr. Nelson and Local 304's Assistant Business Agent John McNamee, who is also a lawyer, engaged in discussions with the breweries concerning the format for the forthcoming negotiations, and advised them that it was Local 304's position that anything beyond one employer, one bargaining unit was contrary to the Act. On November 15, 1982, Mr. McNamee wrote to Mr. Bertuzzi as follows:

Pursuant to our meeting last Friday, November 12, at your offices, I am writing to confirm Local 304's position with respect to the format of brewery negotiations in Ontario this year.

While we have not closed our minds to the possibility of participating in a form of industry negotiations, it is highly unlikely that we would do so unless there was a binding prior agreement or undertaking ensuring that the employers would refrain from placing a condition upon the memorandum of agreement to the effect that such memorandum of agreement was conditional upon ratification by every bargaining unit in the Province.

While we understand that it is a primary employer bargaining objective to, in your words, achieve the same settlement, at the same time with all bargaining units in the Ontario industry, we are not prepared to agree to a negotiations format which may entitle you to attempt to enforce ratification in one bargaining unit by threat of lockout of some other group for whom the memorandum is satisfactory, or conversely, deny that one bargaining unit which has ratified has a collective agreement because of the totally independent actions of some other bargaining unit. As we told you on Friday, we do not believe that such a condition can legally be placed in the memorandum if negotiations proceed on a bargaining unit by bargaining unit basis, and we are not prepared to enter into a form of negotiations which might confer legal sanction for such a condition without satisfactory assurances that your clients will not attempt to exercise any such right.

Accordingly, unless and until we receive such assurances, we do not envision any significant possibility that any of the three bargaining units represented by this Local will be engaged in any form of joint negotiations.

I must also remind you that the employers have received notices to bargain and proposals from each of our bargaining units. Thus far, we have had a reply from only one employer (Labatts) with respect to commencing negotiations, and even the meeting scheduled for that Company was cancelled by the employer.

Given the present situation, therefore, and while I am loath to take a provocative position at the commencement of negotiations, I feel constrained to remind you of the duties imposed upon your clients under s. 15 of the Labour Relations Act, and to insist that agreeable dates for negotiations be set for all three plants, on an individual basis, immediately.

That letter generated the following response from Mr. Bertuzzi on November 18, 1982:

This letter is further to your letter of November 15, 1982 as well as pursuant to our meeting of November 12th held in connection with your notices to bargain for the renewal of existing collective labour agreements negotiated on an Ontario industry basis.

We are pleased to note that at our November 12th meeting the parties agreed on the desirability of negotiating on a joint industry basis a mutually acceptable settlement for Ontario. We do not, however, share many of the views you expressed at our meeting and in your subsequent letter about conditions in the ultimate memorandum of agreement.

For the same reasons that the same parties mutually agreed to such conditions last Ontario negotiations, we wish to reiterate that we intend to vigorously pursue our objective of achieving the same settlement in Ontario at the same time.

The attainment of such a negotiated settlement obviously means agreement by all parties to its contents. We do not believe it appropriate at this time for you to raise preconditions as to the ultimate contents of such a settlement. As you know we are prepared to negotiate in good faith any differences between all of the parties with a view of concluding a mutually agreeable settlement. Ultimately each local union representative together with each company representative will have to voluntarily decide on the acceptability of what is being proposed for the renewal of the subject collective agreements. Ultimately also, the local unions as well as the companies will have to decide on the most effective manner for their respective ratification procedures.

In our view none of the above attempt(s) to enforce ratification in one bargaining unit. . . , as you suggest in your letter. Further, as we pointed out to you at our meeting, the right to strike and to lock out accrues to the parties under the laws of Ontario. Each party to collective bargaining, whether negotiating jointly or not, is entitled to the legal use of such rights. Obviously, based on our successful last negotiations in Ontario, we have good reason to believe that using the same format will lead to the same desired results.

We also agree with your stated desire to proceed expeditiously with Ontario negotiations. Moreover, it is still our objective to proceed on the same basis as last time. We are prepared to schedule company meetings to commence collective bargaining as soon as is respectively mutually agreeable. Please communicate with the undersigned as to your availability.

As in 1980 we will be proposing that the parties then proceed to a joint table for Ontario Industry negotiations with a view to arriving at a mutually acceptable Ontario settlement.

In the meantime we have also agreed to have a meeting with Mr. Plenderleith and senior representatives of the Ontario Unions to discuss the conduct of Ontario industry negotiations.

Mr. McNamee in turn responded with the following letter dated November 22, 1982 to Mr. Bertuzzi:

We are in receipt of your letter of November 18, 1982, with respect to brewery negotiations.

At the outset, I should advise you that the letter contains some fundamental misconceptions:

- 1) You should be well aware that the 'parties' did not agree on the desirability of negotiating on a joint industry basis a mutually acceptable settlement for Ontario. Cameron and I did express the view that there were desirable aspects to the industry negotiations format, but we also said that we believed that the disadvantages of that format, and in particular the spectre of an all or nothing settlement, overshadowed the advantages.

2) We have raised no pre-conditions to negotiations. If your clients had not raised a demand for industry negotiations as a condition, at least at some point, of negotiations, we would have had no concerns. Since that demand has been raised, and in an attempt to partially accommodate it, we have merely notified you as the [sic] circumstances under which we might be prepared to agree to your position.

I might also point out that the second full paragraph on page 2 of your letter succinctly [sic] encapsulates our real difficulty with your industry negotiations position. You are quite correct that the right to strike or lockout can accrue to either party to a set of negotiations whether those negotiations are conducted jointly or individually, but in my opinion there is a significant difference in the term parties between joint and individual negotiations.

In the case of joint negotiations, there are probably only two parties to the entire set of negotiations, ie. 1) all three breweries (and possibly Brewers Warehousing) as represented by your firm, and 2) each and every bargaining unit of employees of those employers who agrees to participate or who does participate to a significant degree in the joint negotiations. Under those circumstances, it is a by no means unreasonable interpretation of the duty to bargain in good faith to expect that one side or the other might legally insist upon overall ratification of the final memorandum instead of a piecemeal ratification.

If, on the other hand, the negotiations proceed on a bargaining unit by bargaining unit basis, it is my opinion that neither party to each individual set of negotiations can place a condition on the memorandum of agreement which is beyond the power of either of them to remove. For example, if Labatt's were to reach a memorandum of agreement with the negotiating committee representing its bargaining unit employees in the Metro Toronto plant, it would be as much beyond Labatt's authority to insist that there could be no collective agreement with those employees until some other group of employees had ratified their memorandum of agreement as it would if Labatt's insisted that the Union could not ratify the agreement unless and until the Russians chose to withdraw from Afghanistan [sic]. In neither case would the employer be complying with the duty to make every reasonable effort to make a collective agreement.

If, however, you meant to imply in paragraph 2 on page 2 of your letter that an individual employer could attempt to do indirectly what it cannot do directly, and itself refuse to ratify an agreement which it had negotiated on an individual basis because some other bargaining unit of employees engaged in separate negotiations had declined to ratify their memorandum, I must again take issue with you. It is my position that such action would also be illegal and that any attempt to lock-out on that account would be contrary to ss. 15 and 93 and would subject the offending employer to heavy damages.

If you disagree with me on that point, as you are of course entitled to do, I cannot see that it causes any of the subject companies any prejudice to their position merely to undertake that they will not seek an overall ratification provision in the memorandum of agreement, but rather will agree that each bargaining unit or Local Union may, as far as the employers are concerned and subject to the law, select its own mode of ratification. After all, if an employer is, as you seem to suggest, free to lock [sic] as a result of the actions of a totally independent and unrelated bargaining unit (a position with which I do not agree) such a term of the memorandum would be unnecessary and redundant in that your clients could therefore attain the stated objective of the same settlement at the same time through other means.

Two further points by way of general comment. First, despite your clients' obvious approval of the last two sets of Ontario negotiations, which were done on an industry basis, the unions involved have not been satisfied with the format. Further, despite the fact the [sic] on both occasions the Ontario industry negotiations ended in peaceful settlements, the 1980 negotiations in Alberta (which were done on the same basis) were an absolute disgrace to any reasonable concept of good faith negotiations.

Second, and as we have repeatedly told you, we are most eager to commence bargaining, and I am pleased that your letter finally shows some indication that this lengthy and rather fruitless exchange of correspondence can finally give way to serious negotiations. I would merely say that, insofar as your letter suggests or implies that individual bargaining unit meetings can only proceed with respect to Local issues, we cannot accept that position.

We would be most pleased, however, to get negotiations underway, and I am happy to confirm the dates which I discussed with your office today.

9. Notwithstanding Mr. McNamee's views, which were shared by Mr. Nelson, it remained the breweries' position that industry bargaining was perfectly legitimate and that it was "the only practical way to go. Accordingly, when the breweries tabled their first offer in the 1982-83 negotiations, it included a ratification clause identical to that contained in the March 25, 1980 memorandum of agreement. Although Mr. Nelson's initial reaction to the clause was that it was illegal, after caucusing with his committee, he moderated Local 304's position by indicating that although it was not illegal for the breweries to seek that clause through collective bargaining, it could not be the last issue. Mr. Bertuzzi took issue with that position and, in the bargaining which ensued, the inclusion of that clause was in fact the final issue. After the breweries had locked out all the employees in the bargaining units covered by the negotiations and negotiations had bogged down for several hours because Local 304 was unwilling to agree to the ratification clause, Mr. Nelson made it known to Mr. Bertuzzi that if Molson was willing to give him a certain seniority letter, he would agree to the inclusion of the ratification clause. The requested letter was then provided and a memorandum of agreement containing that ratification clause was signed.

10. When that memorandum of agreement was signed (on February 28, 1983), the breweries lifted the lock-out which they had earlier imposed, and their employees returned to work. The settlement was subsequently ratified by all but two of the bargaining units covered by the memorandum of agreement. Upon rejecting the settlement, the employees in those two bargaining units went on strike. The breweries permitted the other employees to continue working without a contract. Although the breweries threatened to reimpose an industry-wide lock-out, they did not do so because employees in one of the two bargaining units returned to work two days later (after revoting on the settlement), and employees in the other bargaining unit also revoted and returned to work three days after that.

11. The 1984-85 negotiations which led to the present applications presented a number of difficult problems for the parties. Provisions to minimize the effect of technological change on employees were a high priority for the unions, and in particular for Local 304. Dissension among union representatives, and in particular between the Brewery Workers and Local 304, which was actively involved in attempting to disaffiliate itself from the Brewery Workers, made it difficult for some of the union representatives to even sit together in the same room, and increased their opposition to the aforementioned ratification clause which was dear to the heart of Mr. Bertuzzi who, not unreasonably, saw it as being essential to maintaining an effective format for industry bargaining.

12. The employers for whom Mr. Bertuzzi served as chief spokesman in the 1984-85 negotiations were the three corporate respondents, Labatt's, and Brewers' Warehousing Company Limited (Brewers' Warehousing). In addition to Local 325's bargaining unit and the three bargaining units represented by Local 304, negotiations were carried on in respect of the Labatt's bargaining unit in Waterloo, represented by Local 173 of the Brewery Workers;

the Molson bargaining unit in Barrie, represented by Local 306 of the Brewery Workers; the Labatt's bargaining unit in London, represented by National Brewery Workers Union Local No. 1 C.L.C. (Local 1, which is a local chartered directly by the Canadian Labour Congress), and the employees of Brewers' Warehousing, represented by the United Brewers' Warehousing Workers Provincial Board (the Provincial Board) on behalf of various locals and branches of the United Brewers' Warehousing Workers.

13. Various local negotiations preceded the 1984-85 industry negotiations. For example, after Local 325 gave Carling notice to bargain near the end of November, those parties embarked upon local negotiations at the Carling plant in Toronto. Local 304 also gave the corporate respondents individual notices to bargain for each of its three bargaining units. At a bargaining meeting on November 24, Messrs. Nelson and Bertuzzi discussed various issues pertaining to bargaining format and ratification procedure. With respect to the latter, Mr. Nelson advised Mr. Bertuzzi that his (Mr. Nelson's) position was the same as in 1983. Mr. Bertuzzi responded that his position was also the same as in 1983. In his evidence before the Board, Mr. Bertuzzi testified that he was quite content with Mr. Nelson's position because in 1983 [he and Mr. Nelson] bargained about it and it ended up in the memorandum of agreement.

14. On December 21, 1984, Mr. Bertuzzi filed requests for the appointment of a conciliation officer in respect of the twelve bargaining units covered by the negotiations. Romain Verheyen, who was appointed as the conciliation officer in respect of all twelve bargaining units, arranged to meet with the parties at the Skyline Hotel on January 24, 1985. Since the unions were unwilling to bargain through a common spokesperson or committee, there were three bargaining tables: one for Local 304, one for Local 325, and one for the remaining unions. The Local 304 negotiating committee used a split system for bargaining. Each of its three bargaining units had its own bargaining committee for non-monetary issues. Those committees met with the employers individually to bargain about non-monetary language issues. However, the three bargaining units had a single bargaining committee (consisting of eleven persons) for monetary issues.

15. During discussions between Local 325 and Mr. Bertuzzi near the end of January, counsel for Local 325 asserted that it would be a violation of the *Labour Relations Act* for the employers to push the ratification clause to impasse. However, that point was not further pursued by counsel or by anyone else on behalf of Local 325 prior to the initiation of these proceedings.

16. Following the issuance of no board reports in respect of each of the bargaining units, the employers set February 24, 1985 as a lock-out deadline. That deadline was later extended to February 26. The last formal offer (referred to by the parties as Company 6) presented by the employers prior to the lock-out contained the impugned ratification clause, as did all of the employers' previous offers. Since that offer was rejected by the unions, all of the employees in the twelve bargaining units were lawfully locked out by the employers on February 26th. That lock-out was still in effect as of the date of the hearing of these applications.

17. With the onset of the lock-out, officials of the Ministry of Labour, including Mr. Verheyen and Assistant Deputy Minister Victor Pathe, embarked upon a series of exploratory talks with the parties. During those discussions, Mr. Nelson and Mr. Bertuzzi concentrated on the very difficult issue of technological change and began to make some progress near the

end of the week. Late in the evening on March 8, Mr. Nelson presented a complete proposal to Mr. Bertuzzi in which he asked for monetary, pension, meal allowance, shift premium, and dental plan improvements, as well as a resolution of two outstanding issues concerning technological change. Mr. Bertuzzi then asked Mr. Nelson about a discipline clause which they had been discussing. After a five minute discussion about that matter, Mr. Bertuzzi asked Mr. Nelson, What about my ratification clause? Mr. Nelson's response was, Well I suppose if all the unions are there then I guess we'll agree to it.

18. On the basis of information obtained through those exploratory talks, Mr. Pathe put together a mediator's package, which was Company 6 with certain suggested amendments concerning wages, technological change, and the other issues which remained in dispute. That package, which included the impugned ratification clause, was presented to each of the parties on Monday March 11 for acceptance or rejection. It was rejected by the representatives of Local 304 and Local 325 because they were dissatisfied with part of its wording with respect to technological change, and because they wanted certain improvements in the dental plan and extended recall rights. It is clear from the evidence as a whole that while they would certainly have preferred to obtain a settlement which did not contain the ratification clause desired by the employers, they were prepared to agree to it if they could obtain a settlement which they felt to be worthy of recommendation to the membership.

19. By March 14, Mr. Bertuzzi and Mr. Nelson had further narrowed the issues to a point where agreement was within reach if they could resolve a Molson overtime issue and rules concerning retroactive pay. In response to a question by Mr. Bertuzzi, Mr. Nelson reiterated at that time that he was prepared to agree to the ratification clause if those other matters could be satisfactorily resolved.

20. Since it was apparent that all of the parties were moving towards acceptance of the mediator's package (with certain changes), the parties turned their attention to resolving various local issues which remained outstanding. In a series of meetings between Mr. Bertuzzi and Mr. Greco, local issues concerning Local 325 were reduced to a couple of matters. In a meeting at 2:00 a.m. on March 15 attended by Mr. Pathe, Mr. Verheyen, Mr. Bertuzzi, Mr. Greco, Mr. McNamee, and various other representatives, Mr. Greco advised Mr. Bertuzzi that Local 325 would be willing to agree to the mediator's package, including the ratification clause, if Mr. Bertuzzi would restore a certain letter of understanding and make a change in the weekly indemnity proposal. When Mr. Bertuzzi began to suggest in very strong terms that that was too high a price to pay for a settlement, Mr. Pathe separated the parties. When they reconvened shortly after 3:00 a.m., Mr. Greco, upon being offered the two items which he had requested, said, It's a deal. He subsequently signed the Memorandum of Agreement (the Memorandum) without any comment concerning the ratification clause. When asked why he signed the Memorandum with that clause in it, Mr. Greco testified: I had it in the back of my mind that it was a violation of the Act. Therefore, I had no problem signing it. I wanted to reach an agreement as soon as possible. I wanted my members to go back to work.

21. Messrs. Nelson and McNamee signed the Memorandum on behalf of Local 304. Since they were unwilling to place their names on a page which also bore the signature of Gordon Plenderleith (on behalf of the Brewery Workers) in view of the aforementioned dispute between the Brewery Workers and Local 304, Messrs. Nelson and McNamee signed a counterpart, pursuant to the following provision of the Memorandum: This Memorandum of Agreement must be executed by all parties hereto but may be executed in several counterparts

each of which so executed shall be deemed to be an original and such counterparts together shall constitute the one and the same Agreement. In his evidence before the Board, Mr. Nelson testified that although he remained opposed to the ratification clause, he accepted its inclusion in the Memorandum because the parties had arrived at a settlement which he was prepared to recommend to the membership for their acceptance. He also expressed the view that it would have been irresponsible to continue a province-wide shutdown of the industry over the sole issue of whether that ratification clause should be included in the Memorandum.

22. The Memorandum was also signed by the employers' representatives and by representatives of Local 173, Local 396, the Provincial Board, and Local 1. The first three paragraphs of the memorandum provide as follows:

THE PARTIES HERETO DO HEREBY AGREE TO THE FOLLOWING IN FULL AND COMPLETE SETTLEMENT OF ALL MATTERS OUTSTANDING BETWEEN THEM AND DO FURTHER AGREE TO FORTHWITH AND DO HEREBY UNANIMOUSLY RECOMMEND THE FOLLOWING SETTLEMENT TO THEIR RESPECTIVE PRINCIPALS FOR RATIFICATION AND ADOPTION.

IT IS FURTHER UNDERSTOOD AND AGREED THAT THIS MEMORANDUM IS CONTINGENT UPON ITS RATIFICATION AND ADOPTION BY EACH AND EVERY ONTARIO BARGAINING UNIT AND COMPANY THAT IS A PARTY HERETO.

All collective agreements between the above named parties in the Ontario Brewing Industry and which expired December 31, 1984 are hereby renewed effective from date of ratification of this Memorandum until December 31, 1987 with those appropriate additions, deletions, alterations, amendments or changes as the case may be, that are necessary to incorporate the following:

[The detailed amendments specified in the body of the Memorandum have been omitted from this decision, as have the eight appendices containing language changes in respect of specific collective agreements.]

23. The Memorandum was ratified by all but two of the bargaining units; Local 304's Labatt's (Toronto) bargaining unit rejected it by two votes (128 in favour and 130 opposed), and it was also rejected by Local 1's Labatt's (London) bargaining unit by a somewhat greater margin. As of the date of the hearing, the Memorandum had not been ratified by the corporate respondents or any of the other companies which signed it. On the day after Mr. Greco notified Mr. Bertuzzi that Local 325 had ratified the Memorandum, Mr. Bertuzzi advised him that the lock-out was still on because the Memorandum had not been ratified by the two aforementioned bargaining units. When the members of Local 325's bargaining unit attempted to report to work on March 18, they were advised by Carling that the lock-out remained in effect.

24. The employers were also duly notified that the settlement had been ratified by Local 304's Transport and Molson bargaining units. Mr. Nelson advised Mr. Bertuzzi on several occasions that he was of the opinion that the employees in those two bargaining units should be permitted to return to work in view of their ratification of the Memorandum. When Mr. Bertuzzi refused to accede to that view, Mr. Nelson told him that the employers' offer ought to be put to the employees without the string attached concerning the requirement of ratification by all twelve bargaining units, but Mr. Bertuzzi and the corporate respondents declined to do so.

25. Counsel for Local 325 submitted that the Board should declare the ratification clause to be null and void, direct Carling to sign a collective agreement incorporating the terms ratified by the members of Local 325, and direct Carling to terminate its lock-out of those employees forthwith. Counsel for Local 304 made similar submissions on behalf of his client in respect of the two Local 304 bargaining units which had ratified the Memorandum as of the date of the hearing. The essence of their submissions was that although an employer is entitled to request and bargain for a ratification clause of the type contained in the Memorandum, a demand for such clause cannot legally be pursued to impasse. It was their position that such impasse occurred at the latest when, following the failure of the aforementioned two bargaining units to ratify the Memorandum, the employers refused to offer to the bargaining units which had ratified the Memorandum the terms of settlement contained in it, without the impugned ratification clause. It was also their position that the employers' refusal to do so constituted a breach of section 15 of the Act. Counsel for Local 304 also contended that the Board should find collective agreements to be in force (in respect of the two Local 304 bargaining units which ratified the Memorandum) in the terms of the Memorandum, on the basis that the employers' insistence on including the impugned ratification clause was the only matter which remained in dispute. Thus, it was his position that collective agreements came into force between those parties as a matter of law. It was also his position that the employers' continued pursuit of that clause contravened section 64 of the Act. He further submitted that the employers' failure to ratify is of no legal significance because, in his view, the only reason they had not ratified was their continued insistence on the ratification clause.

26. Counsel for the respondents submitted that the lock-out was not unlawful because it was timely under the Act. In this regard, he noted that none of the corporate respondents had ratified the Memorandum. He also submitted that the section 1(1)(k) definition of lock-out expressly contemplates employer action of the type in question in the present proceedings, as it defines that term to include:

. . .the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, *or to aid another employer to compel or induce his employees*, to refrain from exercising any rights or privileges under this Act or *to agree to provisions or changes in provisions respecting terms or conditions of employment* or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees. . . .

[Emphasis added.]

27. Counsel referred the Board to a number of cases in support of their respective positions. However, few of those cases are of assistance in deciding the instant case as they are either not directly on point, or inapplicable since they pertain to bargaining under a statutory framework different from that which is in force in Ontario.

28. As contended by applicants' counsel, with the exception of the construction industry, the concept of wide area or multi-party bargaining is based on voluntarism in Ontario: see, for example, *Burns Meat Ltd.*, [1984] OLRB Rep. Aug. 1049. In that case, the Board held that it was inconsistent with the scheme of the *Labour Relations Act* and unlawful for a union to take to impasse the bargaining objective of a single nation-wide set of negotiations and a single national collective agreement. (See also *Rolph-Clark-Stone Packaging*, [1980] OLRB Rep. Jan. 93, and *Bruce Henderson*, [1977] OLRB Rep. Aug. 480.) Thus, while an employer

can lawfully seek to engage in industry bargaining by allying itself with other employers with a view to presenting a common front in respect of negotiations with unions which hold bargaining rights for their employees, with the aforementioned exception of the construction industry (and subject to the requirements of section 15 of the Act) each union which holds such bargaining rights can generally insist that collective bargaining take place in respect of each individual bargaining unit for which it holds bargaining rights. (Such union cannot, of course, dictate who will represent the employer for purposes of negotiations. Thus, an employer is free to use the spokesperson(s) of its choice, or to bargain through an employers' organization, as permitted by section 51 of the Act.) However, it is open to a union to engage in broader-based bargaining as, for example, Local 304 did by structuring a single committee to bargain with the corporate respondents in respect of monetary matters. Similarly, it is open to unions such as the applicants to begin negotiations on a (more or less) separate basis, but to gradually transform those negotiations into something more akin to industry negotiations by, for example, agreeing to a ratification clause which requires a memorandum of agreement to be ratified by each of a number of bargaining units, as the applicants did in the present case (and in the past three sets of negotiations). While such a clause serves a legitimate labour relations purpose in the context of industry bargaining, it also presents the risk, which materialised in the present case, that the settlement will be vetoed by one or more bargaining units failing to ratify it. It is unnecessary to decide in the present case whether a union which has signed a memorandum containing such a clause can legally insist upon returning to negotiating on an individual bargaining unit basis as soon as such failure to ratify occurs. For the purposes of this decision, I am prepared to assume, without deciding, that a union can lawfully do so. It does not follow, however, that section 15 of the Act requires the employer in such circumstances to table in respect of each individual bargaining unit exactly the same offer which was included in the general memorandum of agreement. As is evident in the present case, employers may well be willing to make concessions in collective bargaining in order to obtain a ratification clause of the type described above, which was accurately described by Mr. Bertuzzi as being what makes industry bargaining tick. If an employer is not to have the benefit or protection of such clause, then he may well desire, and be lawfully entitled to revise his bargaining proposals and refuse to offer (or ratify), in the context of an individual bargaining unit, an offer which he would be willing to make or ratify in the context of industry bargaining. The fact that the employers were willing to pay a price to obtain such a clause also demonstrates the fundamental unfairness of the position which the applicants have asserted before the Board in the present case. On the basis of their preparedness to sign a memorandum of agreement containing the aforementioned ratification clause, the applicants have obtained a better offer from the employers than they would likely have been able to obtain on an individual bargaining unit basis. Now that the risk inherent in such agreement has materialised, they seek to have this Board strike down that clause and impose upon the employers a memorandum of agreement which does not contain such a clause. Thus, the applicants are in essence requesting the Board to assist them in reneging on an agreement which they entered into with full knowledge of its possible consequences.

29. As contended by counsel for Local 304, the Board has held in a number of cases that employer insistence upon employee ratification of collective agreement proposals may constitute a contravention of section 15 of the Act (as well as section 64): see, for example, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138; *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954; *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; and *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337. However, those cases are readily distinguishable from the present case as they all involve situations in which

an employer was attempting to avoid entering into a collective agreement by insisting upon a ratification vote by employees even though the union which held bargaining rights for those employees was prepared to sign a collective agreement without conducting a ratification vote. In the present case, there is no suggestion that the corporate respondents sought the inclusion of the impugned ratification clause in order to avoid having to enter into a collective agreement; to the contrary, the corporate respondents wished to have such a clause included to ensure that the collective agreements which they desired to enter into would be entered into simultaneously with all twelve bargaining units, in order to eliminate wages and other major conditions of employment as a competitive factor amongst them, and in order to ensure that insofar as possible their respective competitive positions in the marketplace would be maintained during the imposition of any economic sanctions necessary to obtain acceptable collective agreements.

30. In summary, the Board finds that the aforementioned ratification votes did not result in any collective agreement being entered into by any of the parties to these proceedings because the Memorandum, which was lawfully entered into by the parties, was not ratified in accordance with its terms. The Board further finds that in the circumstances of this case, the corporate respondents were not legally required to offer to enter into collective agreements with the applicants on an individual bargaining unit basis without any changes in terms apart from the deletion of the impugned ratification clause.

31. For the foregoing reasons the Board hereby confirms its decision dated March 22, 1985 by which it dismissed these consolidated applications.

0963-84-M Ontario Allied Construction Trades Council and Laborers International Union of North America Local 597, Applicant, v. The Electrical Power Systems Construction Association and **Ontario Hydro**, Respondents

Arbitration – Construction Industry – Grievance – Evidence – Practice and Procedure – Whether employer's rule as to absence reporting inconsistent with collective agreement – Breach of rule not justifying discharge – Substitute with suspension for six weeks – Board not giving any weight to evidence as to statements made during grievance meetings

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *C. A. Ballentine*.

APPEARANCES: *David Strang*, *Gerry Flook* and *Joe Connolly* for the applicant; *Janice Baker* and *Ivar Starasts* for the respondent.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER J. P. WILSON; April 29, 1985

1. The applicant has referred a grievance in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.
2. The grievance alleges that Kevin Callan, a construction labourer employed by Ontario Hydro (Hydro), was discharged by Hydro on January 11, 1984 without just cause. The reason for discharge advanced by Hydro is that Callan was absent from his employment for three consecutive days, January 9th, 10th and 11th, 1984 without reporting to Hydro pursuant to a long established rule.
3. During the hearing, the Board admitted some evidence respecting the statements alleged to have been made in the course of meetings between the parties relating to this grievance at steps 1 and 2 of the grievance procedure. During his argument on the merits of this grievance, counsel for the applicant requested the Board to reconsider its admission of that evidence. The Board consistently has declined to look behind settlement attempts by parties appearing before it on any application or complaint, except in those few instances when the fact of settlement is in dispute and it is necessary for the Board to examine the settlement efforts to see whether settlement was attained. The rationale for the Board's position is that, in order to support and encourage resolution of disputes by settlement rather than by litigation, the Board wants parties to know that they can approach the settlement process with the assurance that they can speak openly and frankly about settlement alternatives without fear of prejudicing the merits of their case if it must be litigated in the end. There may be individual cases where unique circumstances make it necessary for the Board to look behind the settlement attempts, but on reconsideration, the instant case is not one in which there are such unique circumstances as would cause the Board to override its general rule and look behind parties' attempts to settle this dispute in the grievance procedure. For that reason, the Board will give no weight to the evidence with respect to statements made during the grievance procedure prior to this matter coming before the Board for final and binding arbitration.
4. Dan Bonikowski, concrete superintendent, Barbara Tremblay, project medical

attendant, George Wayland, cost accountant, Elton Eshpeter, personnel officer, all employed at Hydro's Darlington Generating Station and Ivar Starasts, a construction labour relations officer for Hydro, testified for Hydro. The Board's decision to give no weight to evidence respecting statements made during the grievance procedure meetings affects all of Starasts' testimony and the bulk of Eshpeter's testimony. Callan testified on behalf of the applicant. Having assessed the credibility of the witnesses, taking into account the firmness of their recall, the clarity with which they related the events about which they were testifying, their ability to resist the influence of self-interest, and their general demeanour, the Board prefers the evidence of the witnesses for Hydro where that evidence conflicts with Callan's. There were internal inconsistencies in his evidence; his replies to direct questions in cross-examination were frequently equivocal; and, when he was challenged in cross-examination on the critical evidence of the message he left with Hydro's security, he twice altered his testimony. Further, he testified in chief that he talked to Hydro's security for five minutes on January 6th. When confronted in cross-examination with evidence to the contrary, he admitted that he had spoken to security for only one minute.

5. Callan was referred through the applicant's hiring hall and was employed by Hydro on January 4th, 1984 as a construction labourer. On January 5th he was injured on the job. Tremblay, who works in Hydro's first aid department at the Darlington Generating Station, sent Callan to the Bowmanville Hospital. Callan reported back to the project by approximately 10:30 a.m. the same day and, on recommendation of the examining physician was assigned light duties. The physician's report which Callan brought back with him from the hospital contained the diagnosis that Callan had suffered no bone injury, only bruising. The physician recommended that he be kept on light duties for two days and then be returned to his normal duties. Callan left work early that day, at approximately 3:30 p.m., with the permission of his foreman. The next day, Friday, January 6th Callan did not work. He called Hydro's security at the start of his shift and reported that he would not be at work that day. He did not call Hydro again until January 23rd. Hydro terminated Callan's employment effective January 11th because he had been absent for three consecutive shifts, January 9th, 10th and 11th, without reporting his absence.

6. Construction employees hired by Hydro to work at its Darlington Generating Station are given a wallet-sized card with instructions about what telephone numbers to call and what information to provide if they are going to be absent from work. One of these cards was issued to Callan. The instructions on the card relevant to the reporting of absences are as follows:

All absences, other than pre-arranged leave, must be reported by the employee (not a friend or car pool rider) within one hour after the commencement of the shift on the first day of the absence, regardless of cause.

The report may be made by telephone to one of the numbers listed on the face of this card. At that time you should provide the following information.

- (a) Your name and badge number.
- (b) Your Foreman's name.
- (c) Your reason for absence.
- (d) Your expected date of return to work.

• • •

An unreported absence of three (3) consecutive shifts may be just cause for termination of employment.

The last paragraph on the card sets out the rule on which Hydro was relying when it discharged Callan. Hydro's evidence that the rule has been strictly applied and that discharge has been the penalty for its breach without deviation is uncontradicted.

7. Hydro has a well established procedure for handling telephone messages from employees when they are unable to work. An employee who follows the instructions on the card issued to him when telephoning to report an absence from work will have his call answered by Hydro's switchboard if the call is made between the hours of 8:00 a.m. and 4:30 p.m. Monday to Thursday and 8:00 a.m. to 2:30 p.m. on Friday. If it is made outside of those hours, it will be answered by Hydro's security staff. Calls coming into the switchboard will be directed to the project field office and taken by clerks in that office. The call is recorded on a log record which provides for the date and time of the call, the employee's badge number and name, the name of the employee's foreman and the reason for absence. The record entry is initialled by the clerk receiving the call. The clerks ask for the employee's name, badge number, the name of his foreman and the reason for absence if the employee does not offer that information. They record the reason the employee gives but do not query the reason. If the employee gives no date of return, the clerk does not request the information. If the employee gives injury as the reason for absence, after the clerk has logged the call, the caller is referred to Hydro's project first aid office.

8. When the employee's call is received by Hydro's security, the guard takes the same information as the clerks in the field office but records it on a message memorandum and sends the memorandum through Hydro's internal mail system to the field office. The field office clerks record the message in the message log, advise the employee's foreman of the message and forward the message memorandum to him. If the message memorandum gives injury as the reason for absence, the information is relayed by the clerks to the first aid office and the clerks note the fact of referral on the log. The first aid office logs the information on the employee's record in the same manner as though the call was being taken directly from the employee. When first aid receives information that an employee is absent because of an injury at work, the first aid staff take the necessary steps to get the information required to initiate the employer's report of injury to the Workers' Compensation Board. First aid does not usually have messages referred to it that an employee has telephoned in to say that he is absent because of sickness. If first aid becomes aware that an employee who has been involved in a work accident has reported in sick, there is no follow-up call made to the employee.

9. Callan did telephone on January 6th to say that he would be absent from work. His call was received by security and it is recorded on the message log for January 6th as having been received at 8:01 a.m. and indicates the reason for absence as still sick. Bonikowski testified that he received the message memorandum from the field office clerks and that it contained the message that Callan was sick and made no reference to injury. He was aware that Callan had been injured the day prior, that he had returned to work following treatment for the injury at the Bowmanville Hospital and that the attending physician had recommended light duty for two days. It was Bonikowski who had arranged for Callan's light duty assignment on his return to work on January 5th following the accident. Because of that knowledge, he was upset when he received the message memorandum that Callan was absent. He admitted in cross-examination that his upset could have been because he thought Callan's accident might

now be counted as a lost time accident. Bonikowski told the Board that he did not check with first aid when Callan's message was relayed to him because the message made no reference to injury. If it had referred to injury, he would have checked with first aid. Absent any reference to injury, he believed at the time that Callan's absence had nothing to do with injury.

10. The first aid office record for Callan indicates that it received a message from the field office that Callan had phoned in to work sick. Tremblay was present in the first aid office when the telephone call was received by another staff member and recorded by that person. She testified in cross-examination that it was unusual for first aid to receive such information and attributed the message respecting Callan as being the probable result of his injury the day before.

11. Callan did visit his own physician on January 6th and, as a result of that visit, he ultimately received time loss compensation payments for the period of January 6th to February 20th, 1984. The Board is satisfied on the evidence before it that Hydro did not know on January 11th when it discharged Callan that his absence was related to his work injury or that his physician had filed a report indicating that his injury was sufficient to disable Callan from his usual work. The Board is satisfied further that Hydro did not know prior to January 23rd that Callan was attributing his absence on January 9th, 10th and 11th to his injury on January 5th. Had Hydro known on January 6th that Callan's absence was the result of his injury on January 5th and that his doctor had recommended that he not return to work until after January 11th, Callan would not have had to report further on January 9th, 10th or 11th.

12. Having regard to the Board's assessment of the relative credibility of the witnesses and to the evidence before it, the Board finds that Callan advised Hydro on January 6th that he would be absent from work that day because of sickness; he failed to advise Hydro of his expected date of return to work; and, he failed to report to Hydro, as required, his absence on three consecutive working days, January 9th, 10th and 11th.

13. Counsel for Hydro argued that Callan's discharge was justified on the grounds that he breached Hydro's absence reporting rule; the rule is consistently applied and, discharge from employment has been the uniform penalty for its breach. Counsel contends that, in order for Callan to have complied with the rule, either he had to inform Hydro on January 6th that he would be off work, for example, until January 12th if that was his anticipated date of return, or he had to phone on each day of absence giving his reason for absence. Therefore, since Callan had reported on January 6th that he would be absent that day because of sickness without indicating at the time of that call the expected duration of his absence and, since he did not call on the succeeding three working days to report his reason for being absent on those days, he had failed to comply with the reporting rule and his discharge was justified.

14. Counsel for the applicant argues that the rule by which Hydro was attempting to justify its discharge of Callan was inconsistent with the terms of the collective agreement and an employer cannot establish and enforce rules which have the effect of overriding terms and conditions in the collective agreement negotiated between the parties. In this respect, counsel was relying on Article 13 – Pay Procedure, clause 13.2 – On Termination, paragraph (f) of which provides as follows:

In established cases of long-term sickness, compensable accident or jury duty, an employee will be maintained on the Employer's payroll for a period of six months or until his normal date of lay-off, whichever occurs first.

As authority for the proposition that rules unilaterally established by the employer cannot override a collective agreement, counsel relies on *Re Lumber & Sawmill Workers' Union, Local 537, and KVP Co. Ltd.*, (1965) 16 L.A.C. 73 (J. B. Robinson, C.C.J.). Counsel contends that clause 13.2(f) also protects Callan from discharge because his absence was the result of a compensable accident. Alternatively, counsel argues that Hydro's discharge of Callan is unreasonable on Hydro's own evidence because the record of the January 6th message which Hydro attributes to Callan, shows the reason for his absence to be still sick. Since that was the message which was relayed to Callan's foreman and to Bonikowski, his superintendent, the reasonable response to the message would have been to relate it to Callan's injury the day before. Instead, Hydro chose to ignore the fact that Callan had been injured on January 5th and gave a strict, literal meaning to the words still sick which were relayed through its message system as being Callan's reasons for absence. Counsel points to the unusual circumstance of first aid being advised on January 6th that he was absent sick as an indication that someone in the message process knew of his injury and saw a need to inform first aid.

15. Clause 29.7 of the collective agreement makes . . . alleged unjustified termination, discharge, suspension or disciplinary action . . . subject matter for the grievance procedure. Apart from that limitation on the employer's actions, if the collective agreement binding upon Hydro and the applicant contains any express limitation on Hydro's right to make and apply rules respecting such matters as discipline and employee conduct other than the provisions of clause 29.7, the parties did not bring those provisions to the Board's attention. Nor did the Board's review of the collective agreement reveal any express limitation on the right of Hydro to make and apply such rules.

16. Hydro's absence reporting rule is not inconsistent with the terms of the collective agreement, at least not in terms of clause 13.2(f) on which applicant counsel was relying. While that provision might have prohibited Hydro from terminating Callan because he was absent on a compensable accident, it would be stretching the meaning of the clause to say that it would prohibit Hydro from relying on grounds other than absence on compensable injury to discharge, suspend or otherwise discipline Callan providing those grounds were just cause for the action taken. Therefore, even if the arbitrator's award in *K.V.P. Co. Ltd.*, *supra*, stands for the proposition argued by counsel, the evidence before the Board in the instant case does not support the conclusion that Hydro is relying on a rule which overrides the negotiated terms and conditions contained in the collective agreement to which the parties are bound. Also, even if counsel is correct in construing clause 13.2(f) to prohibit Hydro from discharging an employee because of a compensable accident, the evidence before the Board does not support the conclusion that Hydro discharged Callan because he was absent as a result of a compensable injury.

17. The conclusion that clause 13.2(f) did not protect Callan from discharge and that Hydro's absence reporting rule is not inconsistent with the collective agreement, is not a complete answer to the question of whether Hydro was justified in discharging Callan for his breach of the rule. Nor does the fact that Hydro has consistently made discharge from employment the consequence of a breach of the rule automatically justify discharging Callan for his breach of the rule. Hydro clearly has reserved to itself the discretion to decide what

discipline would be the appropriate penalty for a breach of the rule when it chose to use the words . . . may be just cause for termination of employment. The exercise of discretion calls for some consideration of the factual context in which the breach occurs other than the simple fact of the breach itself. The factual context in this case is that Bonikowski knew on January 6th, when he received the message memorandum reporting Callan's absence, that Callan had been injured at work the day before. Bonikowski suspected a connection between the absence and the injury, yet, when Callan failed to report his absence on January 9th, 10th and 11th, Bonikowski initiated Callan's discharge for breach of the absence reporting rule. Callan, in fact, was absent on those days because of his injury. A breach of the rule in that context does not warrant discharge in the Board's view.

18. What then is the appropriate penalty? Callan's own conduct is relevant in answering that question. When he reported on January 6th that he would be absent from work that day, he did not say what the expected duration of his absence would be. Presumably he did not know because he did not see his doctor until later that day. But when his doctor recommended a period of absence from work, Callan failed to report that information to Hydro either on that same day or on any of his next three working days. Had he told Hydro on January 6th that his absence was a result of his injury the day before, it would not have been necessary for him to provide this information. Instead, he said that he was still sick, therefore, he must bear some of the consequence of his failure to supply Hydro with the proper information after he had visited his doctor on January 6th.

19. In all of these circumstances and having regard to the Board's discretion under section 44(9) of the Act to substitute another penalty for discharge, the Board is of the view that a suspension without pay for a period of six weeks from the date when Callan was authorized by his doctor to return to his regular duties would be a just and reasonable penalty. The Board directs, therefore, that Hydro:

(1) rescind the discharge and substitute for it a six weeks' suspension without pay commencing with the first working day for which Callan was authorized by his doctor to return to his regular duties;

(2) compensate Callan for wages lost, if any, between the end of his six weeks' suspension and the date when he would have been laid off for lack of work, subject to reasonable mitigation of damages;

(3) remove from his employment record any record of discharge respecting this incident;

(4) not treat the incident as a discharge for any purposes related to his opportunity for future employment with Hydro.

20. The Board will remain seized of these matters should the parties have difficulty agreeing on the amount of compensation, if any, to which Callan is entitled by reason of this award.

CONCURRING OPINION OF J. P. WILSON;

1. I concur with the findings that Ontario Hydro could have chosen a lesser penalty than the discharge of Mr. Callan.

2. However, in addition to finding Mr. Callan a not very credible witness, I am concerned over the length of time that expired before the section 124 application was filed.

3. For a grievance to be filed on January 25, 1984 and not have a section 124 application reach the Ontario Labour Relations Board until July 11, 1984 – some 23 weeks later – falls far short of what the Legislature intended when it enacted section 112(a), now section 124.

4. The intent of section 112(a) was to provide a speedy means for the resolution of this type of dispute in the construction industry and to prevent any delaying tactics and/or careless disregard for time by either party. That has not happened here and I wish to express strong disapproval of the time lapse.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I disagree with the majority decision where it places a six week suspension on the grievor, Kevin Callan, because he failed to report that he had visited his family doctor and would probably be on compensation for some period of time. I point out the visit to his family doctor was made the same day, January 6, 1984, that he had reported by telephone to Hydro that he was still sick. It is also a fact he did qualify for compensation and was properly established on compensation for a lost time injury for a six week period.

2. I agree with the applicant union that Hydro violated Article 13 – Pay Procedure, clause 13.2 on termination paragraph (f) of which provides:

In established cases of long-term sickness, *compensable accident* or jury duty, an employee will be maintained on the employer's payroll for a period of six months or until his normal date of lay-off, whichever occurs first.

(emphasis added)

Hydro terminated Mr. Callan's employment effective January 11th, three working days after he had phoned into Hydro and the day he had visited his family doctor. If Hydro, through its bureaucracy did not know he was on compensation January 11th it surely would have known shortly after, because it is a fact of life, and well established that the Workers' Compensation Board would have been in contact with Hydro (the employer) subsequent to receiving Mr. Callan's doctor's report. At that stage Hydro should have rectified the situation in compliance with the collective agreement.

3. It is my position that the facts and records speak for themselves, there is no need for my colleague Mr. Wilson to question the grievor's credibility, it is also ironical that Mr. Wilson is concerned about the time element in regard to the filing of the grievance. I suggest the evidence was clear that certain grievance meetings took place between the applicant union and Hydro, therefore, the grievor Mr. Callan should not suffer because of the time process, after all its now over five months since the case was heard by this Board, that a decision is rendered. The decision of the majority to place a six weeks' suspension on a working man in this case in my view is unreasonable, Mr. Kevin Callan should be reinstated without any lost time to him.

0046-85-U Ontario Hydro, Applicant, v. Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees' Union Local 1000, Al Beath, Dave Hepburn, Dave Hamilton, Dave Cooper, G. Messer, Cam Fraser, T. Potter, J. Miscione, Wagne Dent, Chuck Paquette, Fred Snow, Jim Vernelli, Bill Graham, John Brisimitzis, Lloyd Church, Harry Forrester, Harry Vanderzwet, John Smith, Jim Leslie, A. Zwaigenbaum, B. Watson, M. Thacker, D. Dudley, Rudy Bronkhorst and R. Lukas, Respondents

Constitutional Law – Remedies – Strike – Unlawful work stoppage ended at time of hearing – Strike affecting third parties and reasonable likelihood of occurring again – Cease and desist order issued in circumstances – Whether extending order to any other persons having notice of order contrary to *Charter of Rights*

BEFORE: *Harry Freedman*, Vice-Chairman.

APPEARANCES: *F. G. Hamilton*, Q.C., *H. A. Beresford*, Q.C., *L. E. Leonoff* and *R. J. Belton* for the applicant; *S. T. Goudge*, Q.C., *Jack MacDonald* and *G. Holland* for the respondents.

DECISION OF THE BOARD; April 9, 1985

1. This matter came on for hearing before the Board on April 8, 1985. The parties agreed that the Board should defer to a later date consideration of the issues arising out of the applicant's claim for compensation for damages and request for a cease and desist direction against the respondent Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees' Union Local 1000 and its officers, officials, stewards or agents. The parties further agreed that any evidence that might be adduced at this hearing relevant to those issues would *not* be relied on in any subsequent hearing and that the parties would be at liberty to adduce relevant evidence at a subsequent hearing into those issues, even if that evidence would be repetitious. Therefore, the applicant's claim for relief, as set out in paragraphs (d) and (f) of its complaint are hereby adjourned *sine die*. I am not seized of those issues.

2. The following decision was rendered orally by the Board at its hearing in this matter on April 8, 1985, after it recessed to consider the evidence and submission of the parties:

This is an application for a declaration and a direction under section 92 of the *Labour Relations Act* in respect of a work stoppage which commenced on Friday, April 5, 1985 at the Pickering and Bruce nuclear power generating facilities operated by the applicant.

At the opening of the hearing, counsel for the applicant sought leave to withdraw this application in respect of Darwin Adams and Russ Closs. Counsel for the respondents consented and the Board accordingly granted the applicant leave to withdraw its application in respect of those two individual respondents. The Board also, at the request of the applicant

and with the consent of counsel for the respondents, hereby amends the name of the respondent Al Deaith to read Al Beath.

The applicant has established that its employees represented in collective bargaining by the respondent Local 1000 employed in the operation and maintenance of its nuclear generating facilities at Bruce and Pickering engaged in a work stoppage which commenced on Friday April 5 and which continued to at least Sunday, April 7, 1985. This work stoppage occurred at a time when such a concerted refusal to work was illegal under the *Labour Relations Act*. Indeed, counsel for the respondents did not dispute that a strike had occurred and that it was illegal.

Counsel for the respondents submits that inasmuch as the applicant's employees have reported for work at the time this hearing commenced, April 8, 1985, the Board should exercise its discretion under section 92 of the Act and refuse to grant the relief requested.

Counsel for the applicant led evidence which demonstrated the significant and severe consequences, financial and social, that have arisen and could arise from an illegal work stoppage at a nuclear generating facility. Those consequences are and can be very extreme and are factors which, counsel for the applicant submits, are relevant in my consideration of whether to exercise my discretion to issue a cease and desist order in this case.

Counsel for the applicant argues that the employees who engaged in the work stoppage have not returned to work. Those employees were scheduled to commence three days of work on April 5 finishing on April 7. The employees are scheduled to work on 12 hour rotating shifts and are assigned to crews. The employees in the crews which engaged in the work stoppage are not scheduled to return to work until the evening of Wednesday, April 9, or the morning of April 10, 1985. Counsel for the applicant submits that their status as employees on strike has not changed since there has been no positive act on their part to indicate that they have ended their illegal strike.

I am satisfied that the strike is over. Employees who are not required or expected to be at work cannot be engaging in a strike. Thus, I am of the view that I must decide this case on the basis that, as of the hearing, the strike has ended.

The principles the Board has applied in exercising its discretion under section 92 of the *Labour Relations Act* where employees who are subject to the application have returned to work at the time of the Board's hearing have been set out in numerous cases, some of which were cited to me in argument. Those principles have been described in the *Acoustical Association of Ontario* case, [1975] OLRB Rep. July 540 at paragraphs 6 and 7; *Consolidated Bathurst Packing Limited*, [1976] OLRB Rep. Dec. 790 at 791-92; and *Bechtel Canada Limited*, [1977] OLRB Rep. May 269 where the Board stated at page 273:

Since both the strike declaration and direction available under section 123 [now 135] are discretionary remedies, they do not issue as of right. The Board's general practice has been to refuse to exercise its discretion to issue either a declaration of an unlawful strike or a cease and desist order where the work stoppage has ended before the hearing as is the case here. (For a review of the practice and the rationale see the *Acoustical Association* case, [1975] OLRB Rep. July 539, *Beatty Bros.* (1965), 66 CLLC para. 16,049 and *National Refractories* (1963), 63 CLLC para. 16,276.)

The Board has consistently stated, however, that it will depart from this general practice of refusing to grant either a declaration or a direction in the face of the existence of any one or more of the following three circumstances: *firstly*, where the evidence establishes a past practice of unlawful strike activity, *secondly*, where the evidence indicates that the unlawful activity is likely to recur or *thirdly*, where the unlawful strike upon which the application is based has implications which extend beyond the immediate parties.

The third exception to the general rule that the Board will not exercise its discretion to issue a declaration or a cease and desist order where there has been a return to work prior to the hearing was first developed in the *Norfolk Hospital Association* case, [1974] OLRB Rep. Sept. 581 where the Board discussed the general rule at paragraph 23 of that decision and then stated at paragraph 25:

... it is our duty, as we see it, as the tribunal seized with the primary responsibility for administering the *Labour Relations Act* and portions of the *Hospital Labour Disputes Arbitration Act*, to re-affirm the law as laid down in those two statutes. The criteria for exercising our discretion in applications of this sort, as set out in the *National Refractories Ltd.* case *supra* will no doubt continue to be appropriate in most circumstances. However, where, as here, there is a deliberate and sustained effort to flout the law, not only at the Norfolk hospital, but elsewhere across the province, we believe it to be our responsibility to so declare. To fail to do so might be construed, at worst, as a condonation of illegal conduct, or at the very least, as an abdication of our public responsibility.

It is clear to me that the unlawful strike resulted from the frustration that the employees felt at the amount of time that the collective bargaining process often takes. However, that process is still ongoing, and may not reach a definitive result for some time to come.

As well, I am satisfied that the union officials did not appear to be actively supporting the illegal actions of their members. The union stewards stayed at their work stations for most of the duration of the illegal strike. However, it is clear to me that the stewards at the work sites did not take positive steps to encourage the employees to return to work. Indeed, the chief stewards at the Pickering generating facility have resigned from union office.

Do these circumstances give rise to any of the exceptions that the Board has developed in dealing with situations where a strike has ended at the time of the Board's hearing?

It is evident to me that the underlying issue, i.e., that of frustration about the bargaining process, has not been eliminated. Indeed, it is open to draw an inference from the evidence that the illegal conduct was

specifically designed to put pressure on the employer at the bargaining table. While I do not need to make that finding, I am satisfied that there has not been a resolution of the collective bargaining dispute which gave rise to the work stoppage.

Additionally, I am satisfied that this particular work stoppage does have implications beyond the immediate parties to the dispute. The evidence makes it clear that an illegal work stoppage at a nuclear generating facility can raise grave concerns about the safety of persons at work on the site, and the environment as well as creating significant risks to the electrical grid throughout the province which supplies electric power to the people of this province. The actual and potential consequences of an illegal strike in these circumstances are not simply borne by the immediate parties to the dispute. Those consequences may adversely affect a large number of persons and industries through the Province of Ontario.

I am therefore persuaded that because the collective bargaining issues underlying the illegal strike have not been resolved and because the respondent union was *not* able to quickly persuade its members to return to work, a declaration and a cease and desist direction should issue. It is apparent to me from the evidence that it took three days for the union's members to be persuaded to report for work and that the union stewards were not in control of the situation. Thus, I am satisfied that there is a reasonable likelihood that another illegal strike may occur.

In any event, I believe the circumstances of this case fall within the principles enunciated by the Board in the *Norfolk Hospital Association* case and this is therefore an additional ground for issuing the declaration and cease and desist order.

Counsel for the respondents argues that the Board should restrict the order to only the named respondents. He submits that making the order apply to any other person having notice of the direction is contrary to section 7 of the Canadian Charter of Rights and Freedoms. He relies on the recent decision of the Supreme Court of Canada in the *Singh* case (unreported, April 4, 1985). In my view, that argument has no merit. The deprivation of a person's liberty or security by reason of a cease and desist direction issued by this Board can only occur after a proper hearing before a judge of the Supreme Court of Ontario. See the decision of the Ontario Court of Appeal in *Ajax and Pickering General Hospital v. Canadian Union of Public Employees* (1981), 35 O.R. (2d) 293. A person's life, liberty or security will *only* be affected after all of the procedural safeguards in the court's enforcement processes have been followed. That type of direction issued by the Board is both lawful, and in this case, particularly appropriate. (See *Bechtel Canada Ltd.*, [1979] OLRB Rep. June 473.)

Therefore, having regard to the foregoing, the Board hereby finds and declares that the individual respondents engaged in an unlawful strike.

The Board hereby directs the individual respondents and any other employee of Ontario Hydro represented by the respondent Local 1000 having notice or knowledge of this direction to:

- (a) cease and desist from engaging in a strike against Ontario Hydro until such time as a strike becomes legal under the *Labour Relations Act*, and
- (b) cease and desist from engaging in any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in a strike against Ontario Hydro until such time as a strike becomes legal under the *Labour Relations Act*.

I am not persuaded that I should direct the union to issue instructions or distribute this decision to its members as requested by counsel for the applicant since there has been insufficient evidence to establish what role, if any, the union had in instigating or prolonging this strike. Of course, it is certainly open to the applicant to distribute this decision and direction among its employees at it sees fit.

1893-84-U Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees Union, Local 1000, Complainant, v. Ontario Hydro, Electrical Power Systems Construction Association, International Brotherhood of Electrical Workers, Labourers International Union of North America, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, International Association of Bridge, Structural and Ornamental Ironworkers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Association of Heat and Frost Insulators and Asbestos Workers, United Brotherhood of Carpenters and Joiners of America, Operative Plasterers and Cement Masons International Association, International Union of Operating Engineers, International Brotherhood of Painters and Allied Trades, Sheet Metal Workers International Association, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and International Brotherhood of Bricklayers and Allied Craftsmen, Respondents

Bargaining Rights – Collective Agreement – Interference in Trade Unions – Unfair Labour Practice – Employer entering into Maintenance Assist Agreements with construction unions - Agreements not intended to apply to employees in unit represented by complainant union – Attempt to convert work jurisdiction dispute into representation issue by allegation of various unfair labour practices not permitted

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *R. McMurdo* and *W. F. Rutherford*.

APPEARANCES: *S. T. Goudge* and *G. Holland* for the complainant; *Harvey Beresford*, *Barry Brown*, *W. S. O'Neill*, *Vello Medrie* and *Brian Story* for Ontario Hydro and the Electrical Power Systems Construction Association; *A. M. Minsky*, Q.C. and *William Warchow* for the respondent trade unions.

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER R. McMURDO; April 25, 1985

1. On February 25, 1985, Ontario Hydro and the Electrical Power Systems Construction Association made a motion before the Board to dismiss the complaints against them. At the conclusion of argument a majority of the Board allowed the motion and stated that the complaint was dismissed in its entirety. The reasons for the oral decision of a majority of the Board on February 25, 1985, are now set forth.

2. In its decision dated February 25, 1985, a majority of the Board stated:

For reasons to be given in writing, the motion made on behalf of Ontario Hydro and the Electrical Power Systems Construction Association is allowed. This complaint is dismissed in its entirety.

In a decision dated February 21, 1985, the Board gave reasons for allowing a similar motion by the respondent trade unions. In that decision the Board, in allowing the motion, dismissed

the complaints of the complainant against the respondent trade unions under sections 48, 49, 60, 66, 67 and 70 of the *Labour Relations Act*. The motion by the respondent trade unions was supported by Ontario Hydro and the Electrical Power Systems Construction Association (EPSCA).

3. The complainant has complained that Ontario Hydro dealt with employees in the complainant's bargaining unit who had been declared surplus by Ontario Hydro contrary to the provisions of sections 48, 49, 50, 64, 66, 67 and 70 of the *Labour Relations Act* and has requested certain relief. The complaint arises in connection with the work of retubing nuclear reactor units at the Pickering Generating Station (the station) and other work respecting the nuclear plant at that station. It is the position of the complainant that on or about October 2, 1984, Ontario Hydro informed the chief stewards of the complainant that effective October 4, 1984, the work referred to earlier would be performed at the station under the terms and conditions of Maintenance Assist Agreements between EPSCA of which Ontario Hydro is the dominant member and several construction trade unions.

4. Section 48 states:

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or
- (b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

The complainant seeks to set aside the Maintenance Assist Agreement or Agreements entered into by the respondent trade unions. It is the position of the complainant that at the time the Maintenance Assist Agreement was entered into, the respondent trade unions were not entitled to represent any employees in the bargaining unit(s) contained therein and entered into the collective agreement with the support of Ontario Hydro. The complainant is apparently referring to section 48(a) rather than section 48(b). Section 48 deems certain agreements not to be collective agreements for the purposes of the Act. Counsel for the complainant was unable to refer the Board to any examples where the Board had entertained a complaint under section 89 with respect to section 48. Typically, issues with respect to section 48 arise in representation proceedings where one trade union is seeking to displace another trade union as the bargaining agent of a given group of employees. In a proceeding which involves the provisions of section 48, the trade union which challenges the collective agreement has established its interest in representing the employees who are covered by the impugned collective agreement. In the instant complaint, the complainant is in essence not seeking to represent the workers who are claimed to be represented by the respondent trade unions. Rather, the complainant is seeking to secure the work performed by these workers for its own members who are covered by its collective agreement with Ontario Hydro. The complainant is a stranger to the representational issue involved in the Maintenance Assist Agreement or Agreements and may not use the complaint procedure under section 89 to convert a jurisdictional issue into a representational issue. The complaint against Ontario Hydro and EPSCA in so far as it relates to section 48 is dismissed.

5. With respect to section 49, the thrust of the allegations of the complainant is that the collective agreement or collective agreements between Ontario Hydro and EPSCA on the one hand and the respondent trade unions has or have duplicated the collective agreement between the complainant and Ontario Hydro. Section 49 states:

There shall be only one collective agreement at a time between a trade union or council of trade unions and an employer or an employers' organization with respect to the employees in the bargaining unit defined in the collective agreement.

A plain reading of section 49 supports the motion before the Board. The section uses the words a trade union or council of trade unions and an employer or an employers' organization with respect to the employees in the bargaining unit defined in the collective agreement. The *Labour Relations Act* is grounded on the principle of exclusive bargaining rights rather than the concept of proportional bargaining rights. The use of the indefinite article in section 49 is in conformity with the principle of exclusive bargaining rights and, in our view, refers to the collective bargaining relationship between one trade union or one council of trade unions and one employer or one employers' organization. If the Legislature had intended section 49 to apply to more than one trade union or council of trade unions, it would have used, in our opinion, any rather than the indefinite article and referred to any trade union or any council of trade unions. The purpose of section 49 is to declare that there may be only one collective agreement at a time with respect to the employees in the bargaining unit defined in the collective agreement. Section 49 addresses and clarifies the relationship between a collective agreement and other agreements between a trade union and an employer which may fall within the definition of a collective agreement in section 1(1)(e) as respecting terms or conditions of employment or rights, privileges or duties of a trade union or an employer. Such other agreements may be for different periods of operation and may refer to such matters as health, welfare and pensions. Section 49 also addresses the situation where there is a master agreement between a trade union and an employer and also local agreements with respect to various locations of the employer. In these instances, section 49 makes it clear that there may be only one collective agreement. Other documents may constitute a part of one collective agreement or may be separate, apart and in no sense a collective agreement. The complaint against Ontario Hydro and EPSCA in so far as it relates to section 49 is dismissed because section 49 has no application to the alleged facts before the Board.

6. Section 50 states:

50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

Section 50 is a declaratory provision in the *Labour Relations Act*. There are at least two and possibly more alleged collective agreements and there are no allegations in the particulars that Ontario Hydro and/or EPSCA have asserted that any collective agreement does not have the binding effect referred to in section 50. The gravamen of the complaint, in our view, relates not to representational rights but rather to a dispute over the assignments of certain work by Ontario Hydro. There is no exact equation between bargaining rights and work jurisdiction. See *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022 and *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451. Even assuming, without deciding, that section 50 gives rise to substantive rights, there is nothing in the particulars

supplied by the complainant which alleges a violation of representational rights by Ontario Hydro or EPSCA. The complaint in so far as it relates to section 50 is dismissed.

7. Sections 64 and 66 of the Act state:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

Section 64 refers to a prohibition against participating in or interfering with the formation, selection or administration of a trade union or the representation of employees by a trade union or the contribution of financial or other support to a trade union. The allegations of the complainant as presented at the hearings before the Board do not constitute participating in or interfering with the complainant with respect to its formation, selection or administration or the representation of employees by Ontario Hydro and EPSCA. Similarly, these allegations as presented to the Board do not allege the contribution of financial or other support to a trade union by Ontario Hydro or EPSCA. The allegations are bereft of any substance with respect to a refusal to employ, or the imposition of any term in a contract or condition of employment or threats of any kind against any person or employee as set forth in section 66. It was argued that the respondent trade unions do not claim to represent employees who are covered by the collective agreement between the complainant and Ontario Hydro and that the complainant has never represented in collective bargaining the employees who are covered by the Maintenance Assist Agreement. The issues between the complainant and the respondents arise not as a result of any violation of sections 64 and 66. The issues among the parties arise as a result of conflicting claims to the assignment of work as a result of more than one regime of collective bargaining and not from violations of sections 64 and 66. The complaint with respect to sections 64 and 66 is dismissed.

8. Section 67 states:

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

Section 67(2) refers to No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions. Section 67(1) does state an offence which an employer, employers' organization or a person acting on behalf of an employer or employers' organization may commit. The Board has considered the complaint, the exhibits filed in evidence by the parties and the opening statement by counsel for the complainant. It appears to the Board that the agreements which are referred to as collective agreements and to which Ontario Hydro and EPSCA are neither intended to be binding on members of the complainant nor are Ontario Hydro and EPSCA attempting to enter into collective agreements with respect to employees in the bargaining unit represented by the complainant. In our opinion, the complainant and Ontario Hydro and EPSCA are confronting each other over a perceived overlap in work jurisdiction and not with respect to bargaining rights. The Board has previously considered complaints under what is now section 89 of the Act with respect to section 67 (formerly section 59). In *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, the Board stated at page 1034:

Nor can it be said that the subcontracting clause interferes with another union's bargaining rights contrary to sections 56 [now section 64] and 59 [now section 67] of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the Labour Relations Act, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 [now section 64] and 59 [now section 67] of the Act are intended to protect bargaining rights only and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 [now section 91] of the Act for the resolution of jurisdictional disputes.

The Board dismissed the complaints with respect to the sections referred to in the quotation and several other sections of the Act.

9. In *Toronto Star Newspaper Limited*, [1979] OLRB Rep. May 451, the Board also considered whether work jurisdiction and bargaining rights are synonymous and the relative place of jurisdictional disputes and stated at page 456:

While the Board recognizes that bargaining units are often defined in terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such

job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work. The fact is that some other bargaining agent may also have bargaining rights for other employees of that same employer that are defined in terms of different work categories, and some of the work performed by the employees falling within these work categories may overlap to some degree that of the other group of employees. Job categories are not watertight and, in fact, there may be considerable leakage between categories, giving rise to competing claims for work from bargaining agents. This sort of problem, as a general rule, is not treated as one involving representation rights of the competing bargaining agents but as a dispute over work jurisdiction. The Act contemplates that such competing claims to work are to be resolved through the jurisdictional dispute procedures set out in section 81 [now section 91].

and again at page 457:

The Board is convinced that this complaint is nothing more than a latent jurisdictional dispute. It is clear to us that the complainant, by framing its argument in terms of a derogation of bargaining rights, is attempting to assert an absolute claim to the work in question. If the Board were to grant the remedy requested by the complainant, it would have the effect of preventing the respondent union from making any claim to the work in question. Even if Local 35-P has the better claim to the work in question, and we make no finding in this regard, such a claim should be asserted through the jurisdictional dispute provisions under section 81 of the Act, and not by means of an unfair labour practice complaint.

The Board dismissed the complaint under section 79 [now section 89] with respect to offences alleged under, *inter alia*, sections 56 [now section 64] and 59 [now section 67]. There is nothing in the material before the Board which alleges a violation of section 67 and the complaint is dismissed against Ontario Hydro and EPSCA in so far as it relates to section 67.

10. Section 70 states:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

The complainant was requested to provide particulars with respect to the alleged violation of section 70. None were provided either prior to or during the hearing on February 25, 1985. The Board is of the opinion that Ontario Hydro and EPSCA are hampered in the preparation of their case by allegations which are indefinite and incomplete. In these circumstances, the Board strikes the allegations with respect to section 70 from the complaint pursuant to section 72(3) of the Board's Rules of Procedure. However, the allegations with respect to section 70 are also dismissed on an additional ground. Section 70 refers to the acts of intimidation and coercion in order to compel persons to refrain from exercising rights under the Act. The Board has previously held that in order for intimidation or coercion to be established in section 70 there must be a threat or other intimidating or coercive action coupled with an express or implied demand that a person refrain from exercising a right under the Act or from performing an obligation under the Act. See *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219. The allegations before the Board do not even remotely suggest such conduct.

11. Having regard to the foregoing reasons and to the decision of the Board in this matter dated February 21, 1985, the complaints against Ontario Hydro and EPSCA are dismissed and the complaints against all the respondents are dismissed in their entirety.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I dissent. Ontario Hydro and the Electrical Power Systems Construction Association signed a Maintenance Assist Agreement in 1983.
 2. The Maintenance Assist Agreement of 1983 had a clause under Scope of Work, Article 2 at 2.1:

The scope of this agreement covers work of a maintenance repair and renovations nature that the owner elects to contract and as a condition of contract the owner elects to stipulate the use of this agreement.
 3. Ontario Hydro implemented that Maintenance Assist Agreement on October 4, 1984.
 4. The complainant then grieved that Ontario Hydro, by implementing the Maintenance Assist Agreement, was placing a new agreement over their already existing agreement that covered the work in question.
 5. I would have allowed the complainant to have proceeded before the Board to prove their case that Ontario Hydro had proceeded illegally by implementing the Maintenance Assist Agreement.
 6. The complainant should have had the right to prove that Ontario Hydro had placed an agreement, over an already existing agreement, that covered the maintenance work in question.
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1305-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Sears Canada Inc.**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Certification – Practice and Procedure – Objectors' argument that seven day period between notice and terminal date inadequate rejected – Dispute as to description of retail stores unit – Whether described in terms of municipality or street location – Whether service centre having community of interest with retail store

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *F. C. Burnet* and *S. O'Flynn*.

APPEARANCES: *Hugh Buchanan*, *Jim McKenzie* and *Jim Pound* for the applicant; *C. G. Riggs*, *Nancy Eber*, *M. Bates*, *L. Ubell*, *K. Eady* and *F. Covelly* for the respondent; *Donald D. White* and *Maureen Day* for the objectors.

DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBERS. O'FLYNN; April 16, 1985

1. By decision of the Board (differently constituted, in part), dated September 11, 1984, the parties were in partial agreement on the bargaining unit description (see paragraph 4 of that decision). A Board Officer was appointed to inquire into the matters remaining in dispute, namely, whether the term retail stores in the bargaining unit description includes the service centre at 823 Erskine Avenue on the basis of community of interest and whether the employees in the customer convenience centre and the merchandise control office are included in the bargaining unit or excluded as office and clerical employees.

2. The application was brought on again for hearing after the release of another Board decision between the same applicant and respondent, *Sears Canada Inc.*, [1985] OLRB Rep. Jan. 111, (hereinafter referred to as the Kingston decision) which dealt with similar arguments about community of interest and the office and clerical exclusion.

3. The parties agreed that, in view of the Kingston decision, staff in the customer convenience centre and the merchandise control office in the retail store in Peterborough would be excluded from the bargaining unit as office and clerical. It was also no longer disputed that the service centre in Peterborough did not share a community of interest with the retail store in Peterborough. It should be noted that the applicant had separately applied for certification of the service centre (Board File No. 2259-84-R). What remained in dispute, however, was whether the bargaining unit with respect to the retail operation should be described as retail store(s) in Peterborough Ontario or retail store at Lansdowne Street.

4. The applicant submitted that, notwithstanding the Kingston decision which referred to a street location, the Board's practice is to describe the bargaining unit as retail store(s) within a municipality where there is (as here) a single location. The applicant referred to several cases in support: *T. Eaton Company Limited*, Board File No. 3015-83-R, decision dated April 13, 1984; *Simpsons Limited*, Board File No. 1781-84-R, decision dated November 7, 1984; *Simpsons Limited*, Board File No. 1878-84-R, decision dated November 15, 1984; *Simpsons Limited*, Board File No. 0887-84-R, decision dated July 30, 1984; *Simpsons Limited*, [1984] OLRB Rep. Sept. 1255.

5. The respondent company submitted that the Board should follow the pattern in the Kingston decision and certify the retail store at the existing street location only. In particular, since some retail functions were performed at the service centre, as found in the Kingston decision, certification on a single store location basis was needed to avoid confusion. It was conceded that the operations at the retail store and the service centre in Peterborough paralleled those at Kingston. Moreover, it was argued the fact that the respondent operated catalogue stores, albeit not in Peterborough, strengthened the need for certification of retail stores by street location to avoid confusion. In effect, the respondent asserted the applicant was being inconsistent in its submissions as between the Kingston and Peterborough certification applications. Finally, the respondent argued that the use of the plural retail stores in the agreed bargaining unit description reflected only the respondent's position that the service centre was included in the appropriate bargaining unit.

6. The Board also heard submissions from counsel for the employee objectors. Counsel submitted that, with respect to the instant certification application and with respect to the certification application Board File No. 2259-84-R, the period between the date the notices were posted and the terminal date was inadequate and unreasonable. While the Board heard the argument in connection with the instant certification application, the parties agreed that the ruling on this issue in this case would be determinative of the matter in the other certification application as well. It was also agreed that the notices were posted seven days before the terminal date in each application.

7. Counsel for the employee objectors argued that the seven days was inadequate given the time needed to obtain legal advice and to prepare and circulate a petition opposing certification, particularly where employees may be on vacation, work shifts, etc. and prior to a final determination of the size and scope of the bargaining unit. Counsel did not refer the Board to any cases in support of his argument nor to cases in which similar arguments were considered by the Board and rejected. Counsel also suggested that the Board practice possibly violated natural justice and section 6 of the *Statutory Powers Procedure Act*; neither of these points was elaborated further.

8. The applicant submitted that the Board had followed its normal procedures with respect to setting the terminal date and that terminal date was within the usual period following the application date. The applicant asserted that counsel, in effect, was quarrelling with longstanding Board practice in dealing with certification applications.

9. With respect to the remaining issue in dispute regarding the bargaining unit description, the Board reserved its decision. With reference to the objection raised by counsel for the employee objectors, the Board ruled orally as follows:

The Board has considered the submissions of the parties. In the Board's view, the arguments presented have been raised on numerous occasions before the Board. The Board does not intend to review those arguments in detail but would refer to one case which sets out the Board's approach and the relevant considerations: *Macdonnell Memorial Hospital*, [1979] OLRB Rep. Oct. 996. The majority of the Board sees no reason to depart from the Board's usual approach, particularly where, as here, there were seven days between the posting of the notice and the terminal date. (Board Member Burnet dissented.)

10. The Board hereby affirms the above oral ruling and would add that the Board followed its customary practice, as set out in Rules 2 and 73 of the Rules of Procedure, in

fixing the terminal date for this application. The Board's authority to so act is set out in section 103(2)(j) of the *Labour Relations Act*. Finally, the Board notes that the seven day period between the date of the posting of the notices and the terminal date exceeds the period which has generally been upheld by the Board as sufficient for employees wishing to oppose a certification application to signify such opposition by complying with the Board procedures.

11. The Board then proceeded with the certification application and reviewed the schedules of employees filed by the respondent and the membership evidence filed by the applicant in support of the application.

12. At the hearing, the Board indicated that statements of desire in opposition to the application were filed with the Board containing 24 names which corresponded with the employer schedules, including 6 names which coincided with the names of those who signed membership cards in the applicant. The Board ruled at the hearing that the statements of desire need not be dealt with further because, even if voluntary, they would not raise doubt concerning the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, so that the Board would exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken despite the fact that more than fifty-five percent of the employees in the bargaining unit were members of the applicant at the relevant time.

13. Further, at the hearing, the Board determined that the applicant's right to certification could not be affected by the Board's ultimate decision concerning the bargaining unit description issue remaining in dispute. On the basis of all the evidence before it, the Board was satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on August 29, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

14. The Board, then, subject to its usual second check and pursuant to its discretion under section 6(2) of the Act, certified the applicant as bargaining agent for the employees in the bargaining unit agreed to by the parties and, pending the final resolution of the issue remaining in dispute, describing the bargaining unit with reference to its retail stores.

15. The Board now turns to the issue reserved at the hearing, namely, should the bargaining unit description be municipal-wide (all retail store(s)) or by street location (retail store at Lansdowne Street). The general Board practice in the retail industry may be expressed fairly concisely. That is, where there is only one store in the municipality, the Board practice is to certify all retail store(s) in that municipality. As stated in *Simpsons Limited*, Board File No. 0887-84-R, *supra*, The plural 'stores' is, of course, used by the Board to indicate that certification is by municipal area, and not by individual store, even though only one store is in existence at the time of the application (at paragraph 3). Where the employer operates at more than one location, the former Board practice of certifying all the stores in the municipality as a single bargaining unit (see: *Goodyear Service Stores*, 65 CLLC 16,018) has given way to a more flexible approach permitting certification at single locations provided certain criteria are satisfied (see: *K Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250). In these circumstances, the street address is included to distinguish the store being certified. This approach, however, assumes there is a community of interest between the employees at the

various locations and the operations themselves are integrated: see *Usarco Limited*, [1967] OLRB Rep. Sept. 526.

16. In the Kingston case, the applicant essentially put forward two arguments: firstly, the *Usarco* criteria were not satisfied, i.e., there was no community of interest between the employees at the retail store and the service centre and these two operations were not integrated; in the alternative, the service centre, the only location which had been organized by the applicant, could be certified separately in accordance with the *K Mart* decision. Certification on the latter basis would require reference to the street address. The respondent argued, basically, that the *Usarco* criteria were satisfied and, secondly, *K Mart* was not applicable to the operations in Kingston.

17. With respect to Peterborough, both the applicant and respondent have changed their submissions. The applicant essentially relied on the finding that the *Usarco* criteria were not satisfied in the Kingston operations, has dropped the alternative argument made in Kingston, asserts there is only one retail store in Peterborough and, therefore, the certificate should refer to the municipality. The respondent has dropped its *Usarco* argument in Kingston but argued that the certificate should refer to street address because that would parallel the Kingston decision and because there were some retail operations at the service centre. In effect, the last argument of the respondent obliquely refers to the reasoning in *K Mart*, i.e., the operations were similar enough that the street location is needed to distinguish amongst the current operations.

18. The Board notes at this point that the parties are certainly not bound to the arguments made in other cases, at least absent an express agreement to the contrary, and are free to change their positions. The Board also noted that the Kingston decision reflects the arguments made to the Board at that time. That decision found that the *Usarco* criteria were not satisfied and, in the alternative, the criteria set out in *K Mart* were present (see paragraphs 24-28). In view of the alternative basis for the decision, the bargaining units were defined with reference to street location.

19. The question, then, is whether the pattern in Kingston should be followed given that the parties and the format of operations are the same, notwithstanding the arguments of the parties are different, or should the Board follow its usual practice in the industry.

20. At this point, the Board would note that the use of the plural retail stores in the agreed bargaining unit description (see paragraph 24 of the September 11, 1984 decision dealing with this application) is not of assistance in resolving the dispute. In the Board's view, the plural reflects the respondent's view that both the service centre and retail store should be included in the bargaining unit. The Board is not prepared to find that the use of the plural binds the respondent if the service centre is to be treated separately. Indeed, the applicant did not seriously press this.

21. In the Board's opinion, it is preferable to follow the Board's general practice and, where there is only a single retail store at the time of the application, to certify on a municipal-wide basis. In Kingston, the Board certified the retail location by reference to street address in view of the arguments in that case and, particularly, as required under the alternate ground for decision. In the instant case, the parties are agreed the operations in Peterborough and Kingston are the same. Thus, the Board's conclusion in Kingston that there is no community

of interest and no integrated operations between the retail store and the service centre, i.e., that the *Usarco* criteria were not satisfied, is applicable. The Board does not consider that the selling which occurs at the service centre is sufficient to generate confusion if the retail store is certified without reference to street location. The Board regards both operations as quite distinct for the reasons set out in the Kingston decision. In any event, any confusion may be resolved by the incorporation in the bargaining unit description of a clarity note specifically excluding the service centre. The nature of any future operations will determine whether such operations are properly treated as accretions to the retail stores, the service centre or neither. However, with respect to Peterborough, the Board does not consider it necessary to adopt the alternative basis for the Kingston decision. Again, as stated, it was this alternative ground which required the reference to street address in the Kingston application.

22. Thus, the Board does not consider that a pattern was irrevocably established in the Kingston decision with respect to the operations of the employer in other municipalities. Kingston is not determinative of the geographic scope of bargaining units at other operations; each application must be determined on the basis of its specific circumstances in the context of the arguments presented and relevant Board practices, if any. In the circumstances of the employee's operations in Peterborough, and the arguments made before this panel, the Board intends to follow the usual Board practice on this issue.

23. As the Board, as set out above, has resolved the only issue remaining in dispute, the Board certifies the applicant as bargaining agent for all employees of the respondent at its retail store(s) in Peterborough, Ontario, save and except assistant sales managers, supervisors, persons above the rank of assistant sales manager and supervisor, security staff, personnel department staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. **CLARITY NOTE:** For purposes of clarity, persons associated with the photographic department, American Optical, Allstate Insurance and the key shop are not employees of the respondent and are not included within the bargaining unit. Also, for purposes of clarity, the term retail store(s) does not include the service centre.

24. Having regard to the foregoing, a formal certificate shall issue to the applicant.

25. Decision of Board Member F. C. Burnet will follow.

1066-84-U Canadian Union of United Brewery, Flour, Cereal Soft Drink and Distillery Workers, Complainant, v. Simpsons Limited, Respondent

Change in Working Conditions – Discharge for Union Activity – Unfair Labour Practice – Whether terminations influenced by anti-union motive – Reasonable expectations of employees test to determine freeze violations – Lay-offs as response to economic down turn meeting test – Carrying on operations by difference method of contract out violating freeze provision

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *J. W. Murray* and *W. F. Rutherford*

APPEARANCES: *E. G. Posen*, *John Forster* and *Glen Tombs* for the applicant; *T. F. Storie*, *E. C. Bengert*, *P. Reid* and *J. Campbell* for the respondent.

DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBER J. W. MURRAY; April 9, 1985

1. This is a complaint filed under section 89 of the *Labour Relations Act*, alleging that the respondent violated sections 66(a) and (c), 70 and 79(1) and (2) by forwarding notices of termination/lay-off on July 11, 1984 to a number of employees in the bargaining unit represented by the complainant.

2. At various points throughout the hearing, matters arose which were then not disputed by either party. It is appropriate to here summarize those facts upon which the parties are agreed.

- (i) The complainant filed an application for certification on May 28, 1984 (Board File No. 0566-84-R); June 22nd was scheduled for the hearing.
- (ii) The complainant was, in fact, certified by the Board without a vote on June 29, 1984 as bargaining agent for all employees of Simpsons Limited at 700 Lawrence Avenue West in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, building engineer, security staff, office and clerical staff, Lawrence Avenue sales room retail staff, drivers and vehicle fleet maintenance personnel, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.
- (iii) At approximately 11:00 a.m. on July 11, 1984, a union officer, Forster, was called to meet with one Reid, a Personnel Officer of the respondent, and was given a copy of the respondent's press release (dated July 11th) regarding terminations of employees, to be effective November 3, 1984.
- (iv) On that same date, all employees of the respondent nationwide received this same information concerning terminations. The terminations affected 116 (approximately) employees in the bargaining unit for which the complainant is bargaining agent.
- (v) The complainant had not given the respondent notice to bargain by July 11th; such notice was given subsequently, on July 12th.
- (vi) The complainant did not consent to these actions of the respondent, nor was the complainant asked to so agree.
- (vii) As it turned out, the original date for the terminations was delayed, for the majority of employees in the bargaining unit, to December 15, 1984.
- (viii) During cross-examination of one witness, E. Bengert (Vice-President, Personnel & Distribution), the complainant sought production of all minutes of the respondent's executive committee from early Fall, 1983 to July 11, 1984. The Board directed written submissions by specified dates. However, the minutes were made available

to the complainant's counsel and the Board need not deal further with this motion. The parties agreed that there was no reference in the minutes to a union organizing campaign or to the restructuring of the respondent that Bengert testified to; there was one reference in the fall of 1983 to the respondent's economic difficulties.

- (ix) Both parties agreed that there have been ongoing discussions between the parties with respect to the details of the terminations, including discussions with the Ministry of Labour (both at the federal and provincial level) and including participation on a manpower assessment committee.

3. The respondent called two witnesses E. Bengert and J. Campbell (general operations manager, Lawrence Avenue facility). The complainant called no witnesses, nor was the credibility of the respondent's witnesses seriously questioned. Having assessed the testimony of the witnesses, the Board makes the following findings of fact.

4. In September 1983, the respondent's executive committee commenced a series of meetings to review the company's operating results in view of substantial financial losses in recent years. Proposals were generated to reorganize the merchandising and marketing functions. A target was established to reduce the company's expense structure by 3% to 5%. To achieve this, every function and unit were examined. The criteria for reducing staff at the retail stores were twofold: an absolute ratio of wage costs to sales was set; a staff complement ratio of 40% full-time to 60% part-time was established. At the Lawrence Avenue facility, i.e., the distribution centre for all Ontario retail stores, the layoff decisions resulted from the modernization of the facility and introduction of a computer system (processes which were initiated two or three years earlier) and from a productivity comparison with a similar facility in another division of the parent firm.

5. The executive committee's deliberations continued through the spring of 1984. Secrecy was maintained because of the sensitivity of the review and the nature of the proposed changes. In late April or early May 1984, the executive committee and chairman of the board decided to implement the recommendations. The actual numbers of employees to be terminated, however, was not determined until early to mid-June.

6. A personnel manual was prepared to guide local management through the termination process with the individual employees. The manual included information on the interview itself, termination pay, benefits, pension plan, UIC procedures, references, etc. Termination pay was calculated at the rate of one week's pay per year of service. Employees notified of their scheduled termination on November 3rd were also asked if they wished to be considered for contingent work although no guarantee as to the number of hours of such contingent work was given by the company. Employees were given time off with pay to seek employment elsewhere.

7. July 11, 1984 was selected as the date for the announcement of the restructuring and terminations. Over 1600 of the approximately 14,000 full and part-time employees were terminated. Each employee received a letter with respect to the restructuring: there were two versions, one for those continuing with the company, the other for those to be terminated as of November 3, 1984. The basis for determining which employees were to be terminated was seniority.

8. Bengert, in a subsequent discussion with Lumsden of the union, indicated that the decision to terminate rather than lay-off the employees was based on two considerations: the

company saw no possibility of recall in the immediate or distant future; a characterization of the release of the employees as layoff would delay the severance payments, a delay considered unfair in view of the non-existent prospects for recall.

9. Before dealing with the terminations at Lawrence, it is necessary to review the history of that operation. The Lawrence Avenue facility changed considerably from its opening as a warehouse in 1954 to date. These changes are sketched only very briefly. In 1961, a third floor was added to handle soft goods merchandise and a leased facility in the Terminal Building closed. In 1971-2, a fourth floor was also added; the facility now covered 750,000 square feet. When the modern Metropolitan Road facility opened in 1975, the heavy goods and workrooms (except the drapery workroom) were transferred there from Lawrence. Affected employees were transferred as well. With Campbell's appointment as general operations manager, Lawrence Avenue facility, the modernization process was begun. In 1982, the Beaumark appliance division relocated to another facility; employees in that department were given the option of transferring and some did. That same year, however, saw the transfer of the ladies fashions operations handled at the Belfield facility to Lawrence; the modern equipment and electronic data systems were also moved. The staff at Belfield moved to Lawrence and the least senior of the combined group were terminated. (See paragraph 16, *infra* for further details). Finally, in 1982, a productivity evaluation programme (PEP) was introduced to provide a means of assessing productivity and increase efficiency.

10. The centralization of the distribution system at Lawrence continued through 1984 and encompassed such programmes as SKU marking to control inventory, Simpson's merchandising processing system (SMPS), line haul shipping of goods to Lawrence using corporate vehicles, scheduled vendor receiving and pick-ups of merchandise in a consolidated mode. Mechanization of the facility progressed throughout this period as well. The cumulative impact of the various programmes and mechanization virtually eliminated the warehousing of merchandise so that the inventory at Lawrence dropped from \$19 million in 1980 to \$4 million by the end of 1983 to significantly less than that figure in 1984. The third and fourth floors were closed as 250,000 square feet of space were no longer needed.

11. In the fall of 1983, Campbell's proposed budget was rejected by the relevant senior executives and the executive committee determined that the distribution costs must be significantly reduced. Campbell was informed by John Stephens, general manger, distribution, (and a member of the executive committee) that the streamlining efforts were to be on a nationwide basis. Some measures were introduced as part of the ongoing cost cutting review started in 1980, e.g., a new ticketing procedure was adopted in December 1983. The standard to which Lawrence was being compared, however, was the Hudsons Bay Company distribution centre, i.e., the identical operation in the sister firm. Lawrence was found to be 58% less efficient. Campbell became aware in about December 1983 that staff reductions were possible. Campbell's staff prepared a detailed analysis of the two operations (exhibit 3) including targets for staffing to reduce the disparity in efficiency. It was this document, completed in early June 1984, which determined the precise number of employee terminations within the various processing functions performed at Lawrence. That analysis only deals with full-time staff, not contingents. The report and recommendations were approved and implemented. (Parenthetically, it should be noted that the streamlining of operations continued past the July 11th announcement. For example, the bill filling operations decreased substantially from January through August 1984. Telephone sales dwindled as volume decreased over several years and

were discontinued in September 1984. Vendors were directed to ship merchandise to Lawrence on a pre-distributed basis by store in September as well.)

12. The impact of the terminations at the Lawrence Avenue facility was as follows. Employees in the printing department were not affected at all as the need for that function continued unabated. Moreover, the printing department staff already had been halved in 1982. The three bargaining unit employees in the cafeteria continued, as did maintenance staff. Non bargaining unit categories, such as, personnel, contingents, delivery services were not affected. As noted in the agreed statement, some 116 employees in the bargaining unit were affected. Seniority was the basis for retaining employees; bumping by senior employees with the ability to perform the duties of other positions was permitted. Although the original date for termination was November 3, 1984, all such bargaining unit employees were given the option of staying until December 15th because of difficulties encountered in implementing another new system, the purchase order management system (POMS).

13. The figure of 116 includes 13 employees in the drapery workroom. The workroom reported through the workroom manager, one Clark, but not to Campbell. The department, which manufactured drapes to customers' specifications, was not integrated or functionally related to the other operations at Lawrence and had lost money every year since 1980. On a \$279,400 sales volume in 1980, \$76,960 loss was recorded; in 1984, \$55,600 was lost on a volume of about \$94,000. The effect of the July 11th announcement was to notify all but three of the drapery workroom employees of termination; the drapery workroom function itself was closed and, in part, subcontracted. The three remaining employees comprised a skeleton staff of clericals. The decision to close the drapery workroom was taken in the spring of 1984, prior to the decision to drastically reduce the numbers of employees involved in the processing function but was dealt with in the same July 11th announcement.

14. It is useful to briefly review the contingent employees place in the firm. Contingents receive the same wage rates but not the benefits of regular employees. Contingents are used regularly to respond to temporary increases in workload and are not guaranteed work. The complement of contingents numbered roughly 400 around July 11th (now slightly more). Company policy is to equally allocate available hours to contingents. The company did not attempt to project contingent hours so as to reduce contingents but retain more full-time employees. The company planned to considerably reduce the full-time complement outright, not shift those hours to contingents.

15. The company has experienced layoffs and terminations in recent years, albeit not of the present magnitude. For example, in 1982 there were terminations in retail stores. In the London region, terminations resulted when some services were phased out. In 1982, the fashion merchandising function was moved from a separate facility at Belfield Road to Lawrence Avenue. The employees involved were transferred and about twenty-five employees (including twelve from Lawrence) with the least seniority in the combined staff were terminated. The terminated employees received severance pay calculated at the rate of one week's salary per year of service. All were offered employment on a contingent basis. A quite recent example of terminations at the Lawrence facility occurred in the spring of 1984 with the consolidation of the pre-retail function. Again, employees were transferred from the downtown store to Lawrence and those with the least seniority in the combined group were terminated. The affected employees were notified of their terminations in May, to take effect in July 1984. (These employees, although located at Lawrence, are not in the bargaining unit

represented by the complainant.) Severance pay was calculated on the same basis as in 1982 and in the massive terminations announced in July 1984.

16. Finally, both Bengert and Campbell denied that there was any anti-union animus in the decision to reduce staff or the selection of staff to be given notice of termination; the timing of the July 11th announcement and the complainant's certification was said to be coincidental.

17. Counsel for the respondent submitted there was no evidence of anti-union animus given the magnitude of the terminations nationwide and the selection of a single date for the announcement. It was a matter of record that certification applications both preceded and followed the July 11th announcement. The terminations at Lawrence, it was argued, resulted from the general decision to reduce staff in the firm, a specific decision to increase productivity at that facility to a level closer to the Hudson's Bay sister operation, and ongoing programmes to modernize and streamline the Lawrence Avenue operation. Counsel contended the use of contingents was not an issue. Terminations of employees had occurred in the past; the seniority system for selection of employees to be terminated then and the treatment of those employees was consistent with the selection and treatment of employees affected by the July 11th announcement. Counsel reviewed the evidence and referred to a number of Board decisions. One group of cases dealt with section 79 of the Act in particular: *Rest Haven Nursing Home*, [1979] OLRB Rep. June 554; *Grey Owen Sound Joint Homes for the Aged*, [1983] OLRB Rep. Apr. 522; *The Winchester Press Limited*, [1982] OLRB Rep. Feb. 284; *Corporation of the Town of Petrolia*, [1981] OLRB Rep. Mar. 261; *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859; *Deacon Brothers Limited*, [1979] OLRB Rep. Oct. 931; *Beaver Electronics Limited*, [1974] OLRB Rep. Mar. 120; *Airline (Malton) Credit Union*, [1981] OLRB Rep. Aug. 1055; *Burlington Carpet Mills Canada Ltd.*, [1980] OLRB Rep. Oct. 1361. The other group primarily involved alleged violations of sections 66, 64 and 70: *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027; *Starplex Scientific Division of Canadian Medical Laboratories Limited*, [1981] OLRB Rep. Mar. 346; *Alumimart Products Limited*, [1982] OLRB Rep. Mar. 309; *Trimarine (Canada) Ltd.*, [1982] OLRB Rep. Jan. 126; *Wilco-Canada Inc.*, [1983] OLRB Rep. June 989; *Superior Glove Works Limited*, [1979] OLRB Rep. July 714; *Global Demolition Ltd.*, [1983] OLRB Rep. Sept. 1457. The Board need not outline counsel's analysis of each of the above cases. It is sufficient to summarize counsel's position. Firstly, there was no breach of section 66(a) or (c) given that there was no evidence the company had any knowledge of individual employee's union membership and in view of the evidence as to the seniority-based system for selecting employees to be notified of termination. Secondly, counsel argued the cases confirmed the right of an employee to carry on business as usual, including implementing terminations, lay-offs and subcontracting where there was economic justification for such decisions. Counsel asserted the respondent company had demonstrated such economic justification and was continuing business as before. Specifically, with reference to the drapery workroom, counsel distinguished *Rest Haven*, *supra*, on the grounds the workroom did not constitute a classification, three clerical staff did remain, and a new classification of employees was not established to perform the work previously done within the bargaining unit.

18. Counsel for the complainant did not assert that the manner in which employees were selected for lay-off was contrary to the respondent's position that lay-offs were determined by seniority. Counsel also acknowledged that participation in union organizing activities had not been a factor in the selection of individual employees for lay-off. However, counsel submitted that the respondent had not satisfied the onus of showing that the economic justification

constituted the *sole* reason for the termination. The Board was asked to draw an inference from the union organizing generally in the industry and the complainant's certification application that the proffered reasons were not the exclusive reasons. With respect to the alleged violation of section 79, counsel reviewed a number of the cases cited by the respondent, including *Beaver Electronics, supra*, *Spar Aerospace, supra*; *Rest Haven, supra*, *Airline (Malton) Credit Union*, and additionally referred to *Scarborough Centenary Hospital*, [1978] OLRB Rep. Oct. 949; *Windsor Airline Limousine Services*, [1980] OLRB Rep. July 1147; *Carleton University*, [1978] OLRB Rep. Feb. 184. Counsel argued the July 11th terminations at Lawrence did not constitute business as before because of the magnitude of the terminations and because the rationales for the earlier terminations (e.g., Belfield facility relocation to Lawrence) were different from the rationales offered as justification of the contested terminations. Furthermore, as the classification of the drapery workroom employees had been eradicated, the reasoning in *Rest Haven, supra*, was applicable. Counsel also asserted that the caselaw permitted changes during the freeze period which implemented or crystallized staff reduction programmes only where the employer had notified employees of the planned changes prior to the onset of the freeze. As such notice had not been given, that line of cases was not relevant. In summary, counsel stated the respondent's action had decimated the bargaining unit and seriously affected the complainant's right to bargain in an open and free relationship, in contravention of section 79 of the Act. Counsel submitted the Board should restore the security of the employees enjoyed pre-July 11th, declare that the July 11th announcement violated section 79 and order compensation for the affected employees.

19. The Board has carefully considered the cases cited by counsel. The Board has also reviewed the recent decision in *Simpsons Limited* [1985] OLRB Rep. Mar. 469. That case, which had not yet issued when the hearing was completed in the instant complaint, involved the same respondent but a different complainant (Retail, Wholesale & Department Store Union, AFL-CIO-CLC) and, as here, concerned the respondent's July 11th announcement of massive terminations. The Retail, Wholesale & Department Store Union represented employees at the respondent's retail store in Oakville. That case, which proceeded on the basis of an agreed statement of facts, alleged contravention of sections 64 and 79 of the Act but did not assert the respondent's decision involved anti-union animus. In brief, the respondent was not found to have violated section 79 with respect to the layoff of the sales staff or receiving employees but a contravention of 79 was found in the layoff of the cleaners, whose work was contracted out, and the alterations staff, whose work was centralized at the downtown location. The respondent was not found to have violated section 64. This Board will refer to the *Simpsons* decision in further detail below.

20. This Board intends to first deal with the alleged violation of sections 66(a) and (c) of the Act. This allegation triggers the reverse onus provision in section 89(5). As set out in the often-cited decision in *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the employer must establish that the reasons given for discharge are the only reasons and that these reasons are not tainted by any anti-union motive. The Board is satisfied on the evidence that the real reason for the terminations was the explanation offered, economic justification, and that there was no anti-union motive involved whatsoever. Both Bengaert and Campbell denied such anti-union animus. While an employer might be expected to deny such an improper motive, the denial in the instant case is supported by the circumstances. The testimony of Bengaert and Campbell was not shaken on cross-examination with respect to the grounds for the decision. There was evidence of economic justification warranting terminations in the form of the annual report, direct testimony and the detailed productivity analysis comparing Lawrence and its counterpart

in Hudson's Bay Company. There is nothing to indicate the respondent knew which employees were union members, let alone used union activity or affiliation as a basis for the terminations. There is considerable evidence that the selection of individuals proceeded on the basis of established company practice, namely, to utilize seniority and permit bumping by more senior employees capable of performing duties in other classifications. In fact, counsel for the complainant did not assert that the manner in which employees were selected was contrary to seniority and conceded that participation in union organizing activities had not been a factor in the selection process. The respondent acknowledged that the terminations did not affect individuals employed as contingents. Counsel for the complainant suggested that the respondent should have made at least some effort to preserve full-time positions by reducing the complement of contingents. Such a move would no doubt have been welcomed by bargaining unit employees, although certainly not by contingents. (The Board would note that the distinction between full-time, bargaining unit employees and contingents is blurred given the Board's definition of full-time employees and the varying hours worked by contingents. There was little evidence on the point. Campbell's guess that the average time worked by contingents was twenty-four hours per week is dead-on the Board's definition.) However, the Board is not prepared to infer anti-union animus on the part of the employer solely from its decision to cut full-time regular staff rather than reduce its complement of contingents. There may be other instances in which such a decision, in different circumstances, may well warrant an inference of anti-union animus. The Board, however, does not find such an improper motive implicit in that decision in these circumstances. The complaint, therefore, insofar as it alleges violation of section 66 is dismissed.

21. The Board next turns to the alleged contravention of section 79. Section 79 reads:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees.

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, in which case subsection (1) applies; or

- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

22. The parties did not dispute the following chronology: certification application filed May 28, 1984; certification granted June 29, 1984; termination announcement July 11, 1984; notice to bargain July 12, 1984. There is no doubt that the July 11th announcement fell within the period caught by the section 79(2) freeze. The issue before the Board, of course, is what was frozen. It is useful to recapitulate the impact of July 11th on the bargaining unit: some categories (e.g., printing department) were unaffected; over 100 employees in the processing function were given notice of termination; thirteen of sixteen employees in the drapery workroom were given notice and that function was partially contracted out.

23. That section 79 is intended to maintain the status quo, to provide a period of stability while the parties are establishing their collective bargaining relationship or renewing that relationship by negotiating another collective agreement, is a sentiment often affirmed by the Board. The classic exposition of the parameters imposed on employer conduct during the freeze is the business as before formula in *Spar Aerospace, supra*. That formula has been referred to in virtually every case which since has considered section 79. The cases also confirm that section 79 is a strict liability provision in that anti-union animus is not a relevant factor.

24. The interpretation of section 79 in the context of particular fact situations, however, has seldom proven simple or straightforward. The Board in *Simpsons, supra*, referred to a passage in *Sunnycrest Nursing Home Limited*, [1982] OLRB Rep. Feb. 261 which it is appropriate to repeat here:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

25. And, as stated in *Grey Owen Sound, supra*, at paragraph 22:

The Board, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, articulated a business as before rule during the freeze period. In essence, the Board decided that the legislative intent of the freeze was to maintain the prior pattern of the employment relationship in its entirety. (See paragraph 19 of the decision). One problem in a first agreement situation is that the parties are in transition from a situation of unrestricted management's rights to one in which collective bargaining will result in some shift in the balance of power as between employer and employees. It is often very difficult in such situations to ascertain what the pattern of the employment relationship was.

26. Section 79(2) freezes the wage rates, other terms and conditions of employment, rights, duties and privileges of the employees and the rights, privileges and duties of employers for the period specified. Most of the freeze cases have arisen in the context described by the above quotation from *Grey Owen Sound*, that is, the transition from unrestricted management rights to a collective bargaining regime wherein those management rights are limited to a greater or lesser extent. In this context, the cases have discussed on the rights of employer versus the privileges of the employees. In other words, the statute freezes employees' privileges

and it is the scope given to the employees' privileges which circumscribes the otherwise unlimited reach of employer rights.

27. Before the transition to a collective bargaining relationship, then, the doctrine of management rights is so broad, so all-embracing that there need be no recourse to employer privileges in the context of section 79(2). Once the transition is complete, however, and the freeze arises when the parties are bargaining for a renewal agreement, there may well be found employer privileges. In *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, for example, the Board held that a union had waived certain rights under its collective agreement and could not adopt a different posture during the freeze.

28. The Board could have interpreted section 79 so as to freeze the precise conditions extant at the time the statutory provision was triggered. The Board, though, has consistently rejected that approach as an unreasonable interpretation of the legislation. In the Board's view, such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the business as before formulation in *Spar Aerospace, supra*, was the Board's response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer's right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

29. Business as before is a slippery concept to apply to specific fact situations. The focus of the test is the pattern of operations, the employer's practice. Certainly, where the practice is accurately embodied in an employer's policy manual, the application of business as before has been relatively straightforward: *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609. There have been other instances where a practice has been so well entrenched as to be beyond dispute: *Spar Aerospace, supra*, with respect to annual merit and annual cost of living increases. On the other hand, the increased parking fee cases illustrate the difficulty in looking for a pattern: see *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98, and the cases cited therein, including *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764 and *Ottawa General Hospital*, September 1984, unreported, File No. 0965-84-U(B). Does business as before require annual adjustments to parking fees, equal increases in fees, regular adjustments, any charge to employees for parking, or, is what is frozen the actual rate in place at the time of the freeze? The cases generally reject the actual rate at the time of the freeze and uphold adjustments to rates. However, the cases reveal the difficulty of looking at a pattern or business as before to measure employees' privileges.

30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *St. Joseph's Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons, supra*; *Burlington Carpet Mills, supra*; *The Winchester Press, supra*; *Grey Owen Sound, supra*; *Deacon Brothers, supra*; *Airline (Malton) Credit Union, supra*. This right has been confirmed even where the

first instance of layoff occurred during the freeze (see *Grey Owen Sound, supra*; *The Winchester Press, supra*; and where the layoffs had occurred elsewhere in the employer's operation but not at the specific location in question (see *Simpsons, supra*). The respondent in the instant case cited *Corporation of the Town of Petrolia, supra*, for the proposition that the employer may also contract out work for the first time during the freeze.

31. Instead of concentrating on business as before, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing on the reasonable expectations of employees. The reasonable expectations approach, in the Board's opinion, responds to both categories of events caught by the freeze, integrates the Board's jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia, supra*; *Scarborough Centenary Hospital, supra*; *Oshawa General Hospital, York-Finch Hospital, supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonable expect such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze: *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244. The Board considers that the upholding of the right to contract out during the freeze period in *Corporation of the Town of Petrolia, supra*, does not establish an unrestricted right of the employer to contract out work during the freeze but, rather, recognizes that the employer in that case had embarked on a programme leading to the contracting out well in advance of the freeze and that the employees would reasonably have been aware of his programme in the circumstances (see par. 20, in particular).

35. Finally, the lay-off cases are consonant with the reasonable expectations approach.

Very few, if any, work forces are entirely static: fluctuations in the size of the staff complement and its composition are the norm. Employers are generally expected to respond to changing economic conditions through the hiring, termination and attrition of employees. It is in this sense that it is reasonable for employees to expect an employer to respond to a significant downturn in the business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze. The magnitude of the layoffs, of course, must be proportional or relative to the severity of the economic circumstances. Economic justification must be proven where relied on and there must be an absence of anti-union animus. It must also be stressed that, while the expectation of layoffs does not initially depend on the specific history of the employer's operation, there might well be specific evidence with respect to that employer which would negate the otherwise usual reasonable expectation of layoffs in response to an economic downturn.

36. The reasonable expectations approach also distinguishes between layoffs and contracting out. Where there was a pattern of contracting out, of course, there would be no violation of section 79 where work was contracted out during the freeze. However, in the Board's opinion, while an employee would reasonably expect a layoff where there was no demand, i.e., where there was an economic downturn, an employee would not reasonably expect that the work would continue to be performed for the benefit of the employer's operation but through contracting out. This is not to say that the employer does not have the right to contract out work during non-freeze periods, except as limited by a collective agreement. During the freeze, however, and unless there is a practice of contracting out, the employer's right to contract out is limited by the employees' privilege of performing the work if the work is to be performed for the benefit of the employer's operation. Contracting out is merely one of the ways an employer might otherwise increase productivity or efficiency which is caught by the freeze; reducing wages, instituting parking fees, ignoring its policy manual are other means of achieving such goals which are proscribed by the statutory provision.

37. The Board, then, must assess the reasonable expectations of the bargaining unit employees at Lawrence. A programme to modernize and centralize the facility had commenced as far back as 1980. Various functions had been consolidated (e.g., the Belfield move) during that time. Technology was being introduced to increase efficiency. The Board need not reiterate all the changes (see paragraphs 10 and 11, *supra*). Moreover, some layoffs had occurred at Lawrence as a result of the consolidations and at other of the respondent's locations in recent times. The economic difficulties of the firm were not secret. In the circumstances, the employees could reasonably have expected layoffs. To be sure, few likely actually anticipated the magnitude of the terminations (the terms lay off and termination are interchangeable in these circumstances). The respondent, however, demonstrated that the scale of the terminations was related to the economic conditions. The Board would particularly note the productivity comparison submitted as exhibit 3. Thus, the Board finds that the terminations of individuals employed in the processing functions not to be a violation of section 79.

38. For the reasons set out above, however, the Board finds that the contracting out of the drapery workroom functions does violate section 79. Admittedly, the drapery workroom had lost money for some time. In the circumstances, the Board would have upheld a decision to scale-down or, if a reduction was not an economically feasible alternative, even close down that part of the operation to reassess the situation (see: *Trimarine (Canada) Ltd.*, *supra*). What the respondent, in the Board's opinion, could not do during the freeze was to introduce a new means of responding to economic difficulties, i.e., to close the department and contract out

that work (at least in part). In the Board's view, it is the introduction of a new means to continue to have the work performed (which is outside the employees' reasonable expectations) which violates section 79, not the elimination of a classification. The Board considers that it was the continued performance of the same functions but through a new system (i.e., the elimination of one classification) which resulted in the breach of the freeze provision in *Rest Haven Nursing Home, supra*.

39. That the drapery workroom function was contracted out (albeit on a lesser scale than when performed by the respondent) only emerged at the close of the hearing when the Board was so advised by counsel for the respondent. The Board was given no details of the scope of the subcontract, the numbers of employees who would not have been terminated if the continuing functions were still performed in-house etc. It may be that the parties are able to resolve those questions without the necessity of a further hearing on this matter. The Board has found that the contracting out, as admitted by the respondent, violates section 79; this violation, however, as flows from the termination of only those employees who would have been required to perform those functions which were contracted out. The selection of employees, once the appropriate number was determined, would be in accordance with the respondent's practice in respect of the other terminations resulting from the July 11th announcement (and consistent with its practice in earlier terminations).

40. In summary, the complaint with respect to the alleged violation of section 66 is dismissed. The complaint alleging breach of section 79(2) of the Act in the termination of employees in the processing function is likewise dismissed. The complaint regarding section 79(2) insofar as it relates to the termination of those employees in the drapery workroom is upheld to the extent that such employees would have been needed to perform the functions contracted out, as discussed in the preceding paragraph. As requested by counsel, the Board leaves the question of the appropriate remedy (within the stated parameters) to the parties. The Board, however, will remain seized in the event counsel are unable to resolve the matter.

PARTIAL DISSENT OF BOARD MEMBER W. F. RUTHERFORD;

1. The facts outlined in the majority decision are a correct statement of the evidence presented. I disagree only with a portion of the decision based on that evidence.

2. When newly organized employees choose a bargaining agent they have notified the company that they have legally selected an agent to represent them in discussions on wages and working conditions including the hope of arriving at a negotiated contract.

3. I accept that the union submitted contract amendments on July 12th one day after the company had notified the employees of a major lay off, and thereby technically the company can argue that the union was outside the freeze period contemplated in section 79(1) of the *Labour Relations Act*.

4. I suggest that the company knew the employees chosen bargaining agent and had an obligation to discuss with that agent their proposals of the major lay off contemplated at 700 Lawrence Avenue before publicly releasing the lay off notice.

5. This type of discussion is important to the employees involved and the bargaining

agent, especially when the newly organized group of 254 full-time employees were to be reduced by 116 people, almost a 50% reduction.

6. The over 400 part-time employees known as contingents are paid at the same rates of pay as the full-time employees but without employee benefits. The contingents, however, would not suffer any lay offs and were in fact increased when the lay off was completed.

7. My opinion is that the company violated section 66(a) and (c) and section 70 of the *Labour Relations Act* by ignoring the bargaining agent at Lawrence Avenue until the public release of the contemplated lay off.

8. The action of Simpson management in dealing with the lay off at Lawrence Avenue would suggest anti-union animus. It would appear they were giving a message to employees that joining a union would not benefit them, thereby attempting to chill any further union organization at their facilities.

9. When employees have not had previous experience with union their perceptions of the duties, responsibilities and rights of unions during an organizational drive is important. The company took advantage of that employee perception by ignoring the union so that the union would not be party to lay off discussions.

10. I would have found the company in violation of section 66(a) and (c) and section 70 of the *Labour Relations Act*.

1667-83-R United Food and Commercial Workers International Union AFL-CIO-CLC, Applicant, v. **Stearns and Foster Canada Limited** (Non-Woven Fabrics), Respondent, v. Group of Employees, Objectors

Certification – Petition – Foreman’s involvement causing rejection of petition – Closeness of count not reason to direct vote – Long time elapsed since application date – Change in composition and thinking of workforce since terminal date not causing direction of vote

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *I. M. Stamp* and *W. F. Rutherford*.

APPEARANCES: *Martin Levinson* and *Kevin Dishart* for the applicant; *Robert A. Macpherson* and *Ron Kerr* for the respondent; *James F. O’Brien*, *George Clarke* and *M. R. MacDonald* for the objectors.

DECISION OF THE BOARD; April 26, 1985

1. This is the continuation of an application for certification which was filed with the Board in October of 1983, and which has formed the subject matter of extensive litigation before the Board.

2. Following an inquiry by an Officer on the inclusion or exclusion of certain persons with respect to the bargaining unit, and consideration by the Board of the Officer’s report, it was determined by the Board that the applicant had filed membership evidence on behalf of slightly in excess of the fifty-five per cent required under section 7(2) for certification without a vote. There was also filed in this matter prior to the terminal date, however, a statement of opposition to the application signed by a number of employees in the bargaining unit, including several who had just prior to that signed applications for membership in the applicant union. Of this latter group of employees, all but one immediately after signing the statement in opposition (or “petition) voluntarily signed a document requesting the Board to disregard their statement on the petition. That one unretracted signature, however, was sufficient to reduce the applicant’s unqualified membership strength from just over fifty-five per cent to just under that mark. The Board accordingly proceeded as a final stage in this application to determine whether the statement signed in opposition by employees, or, more specifically, the employee who did not sign a subsequent document re-affirming his support for the Union, was signed under circumstances which would satisfy the Board that that action was voluntary.

3. As it happens, the employee in question actually gave evidence before the Board, not to explain subjectively why he signed the petition (which the Board would not inquire into), but to give direct evidence of the kind of statements, as the Union sees it, that supporters of the petition were making, and of the active role which foremen of the respondent were taking. That employee, Mark Gray, was a temporary employee, and has ceased to work for the respondent since early 1984. Mr. Gray was not able to specify the date exactly, but testified that he was alone in the washroom at the end of the midnight shift with Ron MacDonald, one of the circulators of the petition, and Mike Baker, the shift foreman. According to Mr. Gray, Mr. MacDonald said to him: There’s a petition going around and you should sign it because heads are going to roll. The petition was being kept at the house of another

employee-circulator, Mr. Clarke, and Mr. Baker said that if Mr. Gray wanted to go there to sign it, Mr. MacDonald would drive him down. Mr. Gray said he agreed at that point to meet Mr. MacDonald in the parking lot, in order to be driven to Mr. Clarke's. Before he left to meet Mr. MacDonald in the parking lot, he called into the washroom two other employees active in the Union, Mr. Whiteman and Mr. Miller. Mr. Gray testified that Mr. Miller had been the one to sign him to his union card initially, and that he felt he should tell Mr. Miller what had just happened to him, and that he was on his way with Mr. MacDonald to sign the petition. Mr. Gray testified that, as a temporary employee, he was concerned about losing his job. Mr. Miller and Mr. Whiteman, he said, told him not to worry about signing the petition, and simply wrote down what he told them of the conversation. They also told him he could come back and speak to them if he had any further problems. Mr. Gray then joined Mr. MacDonald in the parking lot, and was taken to Mr. Clarke's house to sign the petition. This, according to Mr. Gray, meant that no one could say he was either for or against the Union.

4. Mr. MacDonald, for his part, admitted speaking to Mr. Gray on more than one occasion about signing the petition, but could not recall specifically what reasons he gave to Mr. Gray for signing, apart from describing to Mr. Gray his experience with the applicant Union elsewhere. He also agrees that he drove Mr. Gray to Mr. Clarke's house to sign the petition, but denies that the arrangements to do that were made in the washroom. Mr. MacDonald denies that any conversation took place in the washroom with Mr. MacDonald and the foreman, Mr. Baker, at all, and Mr. Baker flatly denies the incident as well.

5. It should be noted that a number of allegations of improper conduct were litigated before the Board with respect to both the petitioners and the lower echelons of management, including Mr. Baker once again, but that no allegations whatever have been made against the more senior levels of the company with respect to its response to the organizing campaign in general. Indeed, the company appears to have demonstrated the kind of non-intervention in the employees' free choice that normally would assist the Board in finding any petition which does materialize to be voluntary, and apparently instructed their foremen to do the same. Unfortunately, a foreman even acting on his own normally conveys to the employees working under him an impression of authority, sufficient to cause fear in the employees, and that is why, as the Board's cases indicate, direct involvement on the part of any foreman, apparently assisting on behalf of management in the collection of names on a petition, is fatal to the issue of voluntariness. Here the alleged involvement of the foreman is with respect to the very individual whose apparent change of mind is in question, and the parties recognized at the hearing that if Mr. Gray's evidence were accepted by the Board, his signature on the petition would not be.

6. Having carefully considered the account of Mr. Gray, his demeanour, his apparent lack of interest in these proceedings at this time, and the elements of corroborative evidence present, against the evidence of those who testified against him, we are unable to conclude, on a balance of probabilities, that Mr. Gray fabricated the story that he told before the Board. While his memory of matters in general connected with the plant and people that he has ceased to have any attachment to for over a year was less than reliable, it is still not difficult to believe that he would retain a recollection of as specific an experience as the kind of dilemma he says he considered himself in in the locker-room that day. And, given the impropriety of involvement by a foreman at all, the precise words used are not as significant as they might be in other situations. Finally, to the extent corroboration is a factor, Mr. Gray's testimony on cross-examination that he immediately reported his experience and his concern to Messrs. Miller

and Whiteman, who made notes, is corroborated by the fact that reference to the incident can be found in the applicant's written charges against the petition filed some ten days after the event, in November 1983.

7. The Board accordingly accepts the account given by Mr. Gray, and rejects the outright denials made by Messrs. MacDonald and Baker. As a result, the Board is not satisfied on an objective basis that the circumstances under which Mr. Gray was requested to sign the petition were such as to reduce the applicant's level of unqualified membership support below fifty-five per cent on a *voluntary* basis. It is, therefore, not necessary to decide the other factual issues litigated before the Board in connection with this petition.

8. There are, however, two remaining matters to be addressed by the Board. At the hearing at which the Board received the parties' submissions on the Officer's report, the respondent urged the Board to direct the taking of a representation vote whether the petition had an impact or not, on the basis of the closeness of the count to the 55 per cent level, and the time that has elapsed since the applicant first filed this matter with the Board. Since that submission was made to the Board, an additional period of months has, again through the fault of no one, now gone by. The Board has also, since that earlier hearing, received a letter dated October 7, 1984, from one of the employees in the bargaining unit, Mr. Dye. That letter contains submissions in a similar vein to the respondent's, being as follows:

October 7, 1984

Dear Sir,

I am writing this letter with the hope that it will not be considered as being after the fact, that is, after our initial submission deadline of Nov'83. The purpose of this letter is to bring to your attention a significant change in the attitudes and numbers of card holders and petitioners since this time last year. (I feel they are significant because the number of employees in our plant is small.)(25-30)

First, since the time of application for certification was filed, *two* individuals who were admitted cardholders have left the employ of Stearns & Foster. (By their own choice). Second, I have heard of at *least* two cardholders who now regret ever having signed a card, but feel that any attempt to reverse this action would be considered as being after the fact and therefore, of no value.

Add to these facts the fact that, with Stearns & Foster's new expansion, some eight or ten new employees may be hired and you can see that what was submitted to you last year as a list of union supporters and a list of petitioners no longer gives a *true* representation of our feelings (as a body toward the need for a Union at Stearns & Foster. *Only* a vote on this issue, either now or after the new employees are hired, will give a truthful representation.

Please, if it is not a violation of current laws or policies, give this letter your sincerest attention.

Thank You Sincerely,

William R. Dye

(Shipper-Receiver)

Normally, of course, Mr. Dye would be put to the proof of the facts which he asserts in his letter. The Board is prepared to deal with Mr. Dye's letter, however, on the basis of assuming that Mr. Dye would in fact be able to prove what he asserts.

9. The reference to an expansion of the Stearns and Foster work force raises what the Board in the past has termed a build-up problem. The way the Board normally deals with such a problem is to defer final consideration of an application for certification until a representative number of employees are employed in the operation. However, in order to balance the entitlement of existing employees to collective bargaining against consideration of the wishes of future hires, the Board has only deferred its processing of an application where the numbers presently employed do not represent at least 50 per cent of the projected total. (See, e.g., *Custom Leather Products*, [1981] OLRB Rep. Aug. 1128, and the cases cited therein.) The numbers cited by Mr. Dye in his letter clearly do not bring the present case within the application of the build-up principle.

10. With respect to Mr. Dye's other submissions, the Board would note that a work force is constantly changing, and in order to make a determination upon which all parties may rely as to the percentage of employees in the bargaining unit who have signified support for the trade union, the Board must fix a point in time as of which each of the necessary determinations are made. This requirement is set out in section 7(1) of the Act:

- 7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

Section 103(2)(j) provides:

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (j) to determine the form in which and *the time* as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined.

(emphasis added)

If the Board determines that the trade union as of the terminal date fixed under section 103(2)(j) has more than 55 per cent of the bargaining unit as members, it is given a discretion to certify the trade union without the additional confirmatory step of a representation vote. Section 7(2) provides:

If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

Given the statutory scheme apparent from the provisions of the Act, this discretion is, in the absence of compelling circumstances, normally exercised in favour of certifying without a vote.

See, for example, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138, at para. 15, and the cases cited therein.

11. What Mr. Dye is really urging the Board to do is to abandon the concept of a fixed point in time, and to attempt rather to continually take into account either changes in the work force, or, as he reports it, changes of mind amongst certain of those who continue to form part of the respondent's work force. His position, therefore, is not materially different from that taken by the respondent at the end of these proceedings, based primarily on the effluxion of time. In considering a similar request for a vote in *Baltimore Aircoil*, [1982] OLRB Rep. Dec. 1387, the Board wrote:

37. However, before considering the petition and counter-petition, we need to deal with the respondent company's position urging that the passage of time since the filing of this application justifies the directing of a representation vote. We cannot agree that a representation vote should be directed on the sole basis of the passage of time since the date of filing of this application for certification. Prior to the interim certification provisions enacted in 1975, the Board experienced many complex applications, that without the intervention of judicial review, took a very long period of time to process differences between the parties. These differences usually centered on the configuration and composition of the bargaining unit. Even today, complex applications for certification involving widespread unfair labour practices or bargaining unit problems can take more than a year to process. If the Board were to accept that the mere passage of time could so fundamentally affect the outcome of an application for certification, an unfairness would be visited on those applicants who, by no fault of their own, become involved in complex and lengthy certification matters. There may also be encouragement for some parties to seek to delay a case in order to achieve this outcome. Clearly, there are equities on both sides of this issue. The turnover in the employer's workforce since the date of application is considerable. However, as already noted, the same level of turnover is possible in a lengthy application for certification not involving judicial review. In fact, the statute, by creating the concepts of application date and terminal date, has considered the effects of labour force turnover and recognized that at some point in time the composition of a bargaining unit must be considered frozen to provide a stable basis for the purposes of a certification application. See *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289.

All of this discussion, however, is premised on the fact that a discretion does exist under section 7(2) of the Act, and the Board cannot say in this one case that circumstances or causes of delay could *never* exist which would prompt the Board to exercise its discretion in favour of directing a vote. The circumstances of the present case, however, are not so exceptional in the Board's view as to cause it to direct the taking of a representation vote, bearing in mind the observations of the Board set out in *Baltimore Air Coil*, *supra*. Nor does the closeness of the applicant's unqualified membership support to the level of 55 per cent persuade us to alter our view. That figure presumably was chosen by the Legislature as representing in itself a clear majority (being in excess of 50 per cent), and the applicant has succeeded in establishing its membership position to be above that figure as of the point in time the Board considers relevant.

12. A certificate will accordingly issue to the applicant.

1255-84-U Eleanor Thibodeau, Complainant. v. Ontario Nurses' Association, Respondent

Duty of Fair Representation – Unfair Labour Practice – Unfair representation complaint based on manner grievance handled – Representation duty not applying to matters not within union's exclusive bargaining rights – Duty not attracted where union gratuitously grieving on behalf of person no longer in bargaining unit

BEFORE: *M. G. Mitchnick*, Vice-Chairman.

APPEARANCES: *Paul L. Thibodeau* and *Eleanor Thibodeau* for the complainant; *Donald F. O. Hersey, Q.C.* and *Marilyn Nairn* for the respondent.

DECISION OF THE BOARD; November 9, 1984

1. The name of the complainant is amended to read: Eleanor Thibodeau.
2. This is a complaint filed under section 89 of the *Labour Relations Act*, alleging that the complaint, Eleanor Thibodeau, was dealt with by her bargaining agent, the Ontario Nurses' Association, in a manner which contravened section 68 of the *Labour Relations Act*.
3. The complainant had been employed for a number of years as a Registered Nurse at New Orchard Lodge, and it was in that capacity that the respondent Nurses' Association represented her as bargaining agent. The matters of which the complainant challenges the handling on the part of her bargaining agent were in fact the subject of an arbitration case which the respondent Nurses' Association fought and lost for her. Critical to these proceedings are the opening paragraphs of that arbitration award setting out some of the background facts to the events spawning the grievance, in a manner which the complainant agrees is accurate. That portion of the award reads:

In September, 1981, the grievor felt the need for a change in her work and made application for employment at two or three places. The Royal Ottawa Hospital's Rehabilitation Centre, a new facility, seemed to offer an attractive position. The grievor was interviewed by the Head Nurse of the Amputee and Stroke Floor with the result, said the grievor, that she was offered a position starting with orientation on September 8. The grievor asked for an extension, so that she could give New Orchard two weeks' notice. She testified that she was told she could start September 21, and that she was safe to resign her present job.

The grievor then proceeded to tell Helen Mills, the Director of Care at New Orchard Lodge, that she was resigning. This was confirmed in a handwritten letter dated September 4, 1981 in which the grievor resigned as of September 18.

The problems which have arisen in the life of the complainant all evolve from there. The complainant never did join the staff of the Royal Ottawa Hospital. Rather, the complainant was advised by the Royal Ottawa Hospital on September 16th that, as a result of a letter of reference received from New Orchard Lodge, the offer of employment to her was withdrawn. The complainant was exceedingly upset, and attempted in vain to persuade the Royal Ottawa Hospital to change its mind. She then approached New Orchard Lodge and asked whether they would consider giving her her old job back. She was told that that job had been filled, but

was apparently offered a job on another shift. The complainant maintains that she then worked out an agreement with the Lodge that if she could obtain the consent of an employee at the Lodge to switch with her, she would be given her former job back. The complainant further maintains that she succeeded in obtaining such consent, but that the Lodge then refused to hire her.

4. The respondent Association filed a grievance on the complainant's behalf, and, as noted, took the matter all the way to arbitration. The grievance essentially concerned itself with trying to force the complainant's former employer to rectify the letter of reference it had issued, since employment at the Royal Ottawa Hospital had always been the complainant's primary goal, but alternatively the Association tried to argue that the Lodge had been in breach of its agreement to re-hire the complainant if certain conditions had been met. It is the respondent's handling of this grievance, and the matters which form the subject of this grievance, which the complainant seeks to challenge before the Board in the present proceedings. It should be noted that the complainant also retained legal counsel on her own and on his advice filed a law suit against the Royal Ottawa Hospital for breach of promise, and against New Orchard Lodge (Extendicare) for breach of promise (to re-hire) and wrongful dismissal. With respect to the former, the Royal Ottawa agreed upon a monetary settlement out of Court, while the action against New Orchard Lodge was dismissed with costs.

5. It is the position of the respondent that neither of the matters for which the respondent made its effort to seek relief for the complainant were matters falling within the duty of fair representation encompassed in section 68, once the complainant had voluntarily resigned her employment with the Lodge, as she clearly admits she did. Rather, the respondent asserts, it pursued these matters from the outset not out of a sense of obligation, but simply out of a desire to assist the complainant as much as it could, being a matter in which the respondent itself felt that the complainant had not been fairly treated.

6. The Board must agree with the submission of the respondent that the matters in question here do not fall within the ambit of the duty of fair representation, and are outside the scope of the Board's scrutiny under section 68. That section of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

In attempting to define the limits of the duty set forth in the above section, the Board has frequently made reference to the problem of bargaining-agent exclusivity which constitutes the starting-point from which the duty has evolved. In *Ford Motor Company*, [1973] OLRB Rep. Oct. 519, the Board commented:

36. The union's exclusivity is summed up by the Supreme Court of Canada in *Le Syndicat Catholique des Employées de Magasins de Quebec Inc. v. La Campagne Paquet Ltee* (1959) 18 D.L.R. (2d) 346, by Judson J., as follows:

The union is, by virtue of its incorporation under the Professional Syndicates' Act and its certification under the Labour Relations Act, the representative of all employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered

by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all . . . It was not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement . . .

While that case was concerned with the statutes of a different Province the conclusions of Judson J. are applicable to the legislation of this Province. Thus, the individual collective interests of the members of the bargaining unit.

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38. Section 60 [now 68] of The Labour Relations Act is to ensure that individual rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation.

The duty applies, in other words, to protect employees who are represented by a trade union in a bargaining unit, in the words of the statute, and for whom the trade union has exclusive bargaining rights. It is because the trade union acquires the *exclusive* right to represent the employee in matters falling within the purview of its bargaining rights, eliminating individual rights of recourse for the employee herself, that the duty came to be evolved. The duty thus extends no further than matters falling within the realm of the Union's exclusive bargaining rights. In *A. J. Roberts*, e.g., [1974] OLRB Rep. Mar. 169, the Board concluded that the duty could not be extended to the union's role in assisting (or otherwise) an individual in actually being *hired* by an employer. What is now section 69 of the Act was added specifically to overcome that problem in situations where, as in the construction industry, the trade union has the exclusive right to refer prospective employees to employment, but that is not the situation with the parties in the present case.

7. Here the respondent, not out of compulsion, but, as it says, acting gratuitously, sought to render what assistance it could by grieving the matters of concern to the complainant *as if* they were matters covered by the collective agreement; that is, as if they were matters about which the respondent was entitled to enforce relief for the complainant through the arbitration provisions and the collective agreement. But they were not such matters. Rather, both were matters falling outside of those aspects of the employment relationship for which the respondent was the complainant's exclusive bargaining agent. One was the impact of the Lodge's letter of reference on employment elsewhere than at New Orchard Lodge, and the other concerned the efforts of the complainant to have New Orchard Lodge re-hire her as an employee and accept her again into a position in the bargaining unit. The board of arbitration correctly held that the former was not a matter which the respondent could properly grieve under its collective agreement, and could have said the same with respect to the second (had it chosen to deal with the matter), in light of the unqualified admission by the complainant that she had voluntarily resigned her employment to begin with. No collective agreement provides relief against an employer who has accepted a *voluntary* offer of resignation from an employee (whether or not the employee continues to work out her period of notice), and it is not suggested that the instant collective agreement contained special provisions on hiring

which would have brought this matter within the ambit of the arbitration machinery of the collective agreement. Once the employer refused, therefore, to accede to the respondent's overtures in the grievance procedure, the complainant was inevitably left with no recourse through the arbitration machinery of the collective agreement, and was compelled to pursue her claims through common-law actions in the Courts, as in fact she did. It is unfortunate, from the complainant's point of view, that these actions in the Courts could not have ended with a more satisfactory result, but the Board must conclude, as a matter of law, that the respondent Ontario Nurses' Association owed no duty under section 68 to assist the complainant with respect to the dilemma the complainant found herself in, and its gratuitous efforts on her behalf, at least on the facts of the case before us, lie outside the scope of this Board's scrutiny.

8. The complaint is accordingly dismissed.

3021-84-U Donald Vasseur, Complainant, v. Labourers' International Union of North America, Local 1059, Respondent

Duty of Fair Referral – Unfair Labour Practice – Delay in filing reasonably explained – Complaint not barred – Motion to dismiss for lack of prima facie case denied – Union decision and practice to limit number of name hires – Conscious policy adopted to protect out-of-work members – No breach of referral duty even if violation of union by-laws

BEFORE: *Paula Knopf*, Vice-Chairman.

APPEARANCES: *David J. Ashford* for the complainant; *David Strang, Ken Sawyer, Manuel Reis, Jose Alves* and *Tom Connelly* for the respondent.

DECISION OF THE BOARD; April 18, 1985

1. The name of the respondent is amended to read Labourers' International Union of North America, Local 1059.

2. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of section 69 of the Act. The basis of the complaint is that the union violated its by-laws and the Act by effectively preventing the complainant from being name hired on a pipeline construction project.

3. At the opening of the proceedings, the respondent raised two preliminary objections to the complaint. First, it was submitted that the complaint was untimely and should be dismissed. It was argued that the events which gave rise to the complaint all occurred in the latter part of June and early July of 1984. The project in question was completed in September of 1984 and the contractor, Majestic Contractors Limited (Majestic), has since left the province and returned to Edmonton, Alberta. The complaint itself was not filed until February 11, 1985. The particulars of the complaint referred to people affiliated with Majestic. Therefore, counsel

for the respondent voiced concern about being prejudiced by the respondent's inability to obtain witnesses at this time from Majestic to assist in the respondent's defence. The respondent referred the Board to the case of *Luciano D'Alessandro*, [1983] OLRB Rep. Oct. 1699.

4. In response, the complainant testified that his delay in processing his complaint arose because of the time it took him to process his application for legal aid in London, Ontario and to retain counsel. These delays were due partly to the complainant's absence from London while on a job in Sudbury and partly due to the procedures of Legal Aid itself. Counsel for the complainant also stated that the complainant's case would not in any way be based upon statements made by agents or principals of Majestic.

5. The respondent's second preliminary objection was that the complainant had not raised a *prima facie* case in his complaint because the materials filed did not allege that any other person was improperly hired over the complainant, that the complainant had secured a name hire request from Majestic that had been denied, or that the union had ever arbitrarily, discriminatorily or in bad faith frustrated the complainant's attempts to get a job with Majestic. The respondent submitted that the complainant's case at its highest could only raise a suggestion of a breach of the union by-laws and that that would not amount to a breach of section 69 of the Act. The Board was referred to the case of *Thomas Beck*, [1985] OLRB Rep. Jan. 14.

6. The Board reserved ruling on the issues of timeliness and the *prima facie* case and heard the evidence of the complainant on the merits of the claim because of a lack of details and clarity in the complaint that was filed and in order to properly assess the substance of the respondent's objections. Thus, the complainant was called to the stand to testify and was cross-examined thoroughly. No other witnesses were called in support of the complainant's case. After hearing the testimony of the complainant, the Board was able to rule on the preliminary objections. On the issue of timeliness, the Board was mindful of the oft quoted criteria set out in the *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420 at paragraph 22:

A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

In this case, it was apparent from the complainant's testimony that he was not relying upon any statements or conduct of the associates of the contractor Majestic. The union did not submit that a representative of Majestic would be crucial to their defence after hearing the complainant testify. Therefore, the issue of prejudice was resolved by the evidence which made it clear that in this particular case, the unavailability of Majestic would not prejudice the union. Further, the period of delay was satisfactorily explained to the Board. Thus, this was not an

appropriate case to bar the complaint on the basis of the time of its filing. However, a delay such as this would be a relevant factor in the question of remedy, should the complaint succeed.

7. On the preliminary issue of whether the complaint disclosed a *prima facie* case, the Board ruled that a *prima facie* case had been raised. The union then elected to call evidence in response. The merits of the case shall be discussed in detail below and so there is no need to deal further with this objection.

8. The facts giving rise to the complaint are relatively clear and uncontradicted. The union adopted a set of by-laws in the spring of 1983 to deal with its responsibilities with regard to the running of its hiring hall. The by-laws which are relevant to these proceedings are:

3.01 Local 1059 shall maintain two hiring hall lists as follows:

(ii) Southern List – covering Local 1059 jurisdictional area south of a line drawn from and excluding the Town of Goderich to and excluding the Town of Palmerston.

3.03 On jobs within the jurisdictional area governed by the Southern List, where collective agreements require members to be referred from the Local 1059 Union Office, Work Referral Permits shall be issued on the basis of a single name request from the Members listed on the Southern List followed by a single supply of a Member from the Southern List. The ratio to be maintained is one name request from the Southern List by the Employer followed by one referral from the Southern List by the Local 1059 Union Office in accordance with these by-laws. A company in exercising its one name request may select one Member from the Southern List by name no matter where that Member appears on the Southern List. The next Member to be referred to that Employer whether encompassed by the same call for men or a subsequent call for men must be filled by a Member on the Southern List on the basis that the said Member out of work the longest and registered on the Southern List the longest shall be first sent to work provided that Member is able to perform the work required by the Employer as contemplated in paragraph 3.09 of this by-law. All named requests for employees must be in writing.

3.06 All Members transferring into Local 1059 from other Locals of the Labourers' International Union of North America will be added to the bottom of the Hiring Hall Lists and may not be sent to work for a period of at least 120 days by employer request, unless in accordance with the paragraph governing the Hiring Hall Lists and referral of members by the Local 1059 Union Office save and except for the provision relating to an employer name requests. In circumstances where an operative collective agreement provides for the transfer of Members into the jurisdictional area of Local 1059 from outside locals of the Labourers' International Union of North America as key men, the transfer of such key men shall be considered name requests giving rise to the right of Local 1059 to supply members from the out-of-work lists on the basis that the Member out-of-work the longest and registered on the list the longest shall be first sent to work until the ratio of one-to-one is re-established. Members transferring back to Local 1059, who were originally initiated into Local 1059, are exempt from the 120 day waiting period before being allowed to be requested by name.

9. In June of 1984, Majestic came into the jurisdiction of the union to execute a pipeline project requiring approximately 30 men from this Local. It is acknowledged by all that any member of the union would have a tremendous desire for one of these jobs because they are so lucrative, netting \$1,200 to \$1,800 a week for each individual.

10. The complainant was particularly desirous and anxious to obtain one of these jobs. He had not had a great deal of work in the past year and he did have experience on pipeline projects. He has only recently transferred back into the Local in the hopes of getting this job

after being away on a job in another jurisdiction. But he knew he was approximately 300th on the out-of-work list and therefore had no chance of getting work by a straight union referral from the list. What he then desired to do was to approach the company directly and to try and convince someone there to request him specifically at the prejob conference or to submit a name request for his services. This could result in him being named hired and is permitted under the union's by-laws.

11. The prejob conference was held on July 3, 1984. At the conference, the union was represented by its Business Agent, Manuel Reis, and its International Representative, Ugo Rossini. One of the traditional purposes of the prejob is to give the employer the opportunity to submit the names of their key men or particular men they want to have at the job. This union allows this and, in accordance with the by-laws, ensures that the ratio of requests and hirings from the list remain one to one. On this particular project, Majestic named six men. The complainant was not requested by Majestic. After the six names were submitted and accepted, the evidence of Mr. Reis is that the union then requested, and the company then agreed, that there would be no further name hires or name requests on the project. Mr. Reis's reasons for obtaining this agreement or commitment was that it would save the union and the company a lot of headaches by avoiding having up to 50 men in the yard waiting and trying for jobs daily. Further, Mr. Reis says that this kind of arrangement is customary for the union and the union prefers this because it would avoid the corruption that could be associated with members trying to convince employers to submit name requests and thus avoid the out-of-work list. Mr. McKinnon, the Secretary/Treasurer and Acting Business Manager of the union, is someone with more experience on prejobs than Mr. Reis. Mr. McKinnon explained that the limiting of name requests is the normal practice at prejobs in pipeline and other projects. The reason for this is to help ensure that local members are called into jobs on the basis of their placement on the out-of-work list so that men unemployed the longest would get the work. Yet, he admitted that on every job members also go out and try to sell themselves to the contractors and obtain name requests for their services to jump the list.

12. In any event, immediately after the prejob conference, the complainant discovered that Majestic had not submitted a name request for him. So he spoke to Mr. Reis and Mr. McKinnon immediately about his chances of being hired as a name request. Mr. McKinnon told the complainant, We'll face that when the time comes. Mr. McKinnon and Mr. Reis met the complainant shortly thereafter the same day and told him that he could not be hired as a name hire because of the arrangement that had been made at the prejob. They told him that he could no longer be requested by Majestic. This was on June the 29th.

13. On July the 3rd, the project began. The complainant again appeared at the job site hoping for work as did approximately 25 other union members. The complainant was unsuccessful as were the others. On July the 9th, he took his complaint to the union's Executive Board, still seeking the opportunity to be selected as a name hire. While there is some dispute over what occurred at this meeting, it is clear that his complaint was heard and he was given an employee request form. That is the document that Majestic could have completed to have made a name request for the complainant's services. In addition, the Executive Board decided that it needed a legal opinion to determine whether or not the company could now make a name request after the arrangement had been made with the union to limit the number of name requests. Thus, the Executive Board told the complainant that it would seek the opinion of their lawyers. The complainant understood this to be an enquiry as to whether or not the by-laws would apply to this particular job. The following day, the

union obtained the opinion of their lawyer. The lawyer advised them that the by-laws did apply to the job and that should the company submit a name request for a particular union member, this should be honoured. This opinion was given to Mr. McKinnon who relayed that opinion to Mr. Reis. However, when the complainant talked to Mr. Reis, the complainant was left with the impression that Mr. Reis had said that the legal opinion had been that the by-laws did not apply to that particular job. Mr. Reis denies saying that to the complainant. I must conclude that there was a misunderstanding between Mr. Reis and the complainant. It was certainly the union's impression that the company had on reserve the right to continue to make a request for a name hire should they wish to exercise it. However, this was never made clear to the complainant. Further, the complainant was under the clear impression that no name hires would be accepted in the future.

14. In any event, although the complainant had the employee request form which had been supplied to him by the Executive Board, he did not take it to the contractor to have it filled out. He clearly did not do so because he felt it would be of no use. The evidence also establishes that Majestic did not submit any other name request for hiring and that, with the exception of the six names submitted at the prejob conference, all the other jobs on the project were filled through the union's out-of-work list in accordance with the order on that list.

15. The argument made on behalf of the complainant is that the union's by-laws must be binding upon the union. But, nothing in the by-laws permits the union to make the kind of agreement it did with Majestic to limit the number of name hires and thus prevent an individual from having himself hired upon a job. It was said that this amounted to discrimination.

16. In response, the union argued that this fact situation falls within the facts of the *Thomas Beck* case, *supra*, in that if anything, all that has been established was a breach of the by-laws and not a breach of the Act. Further, or in the alternative, the union submitted that the complainant's failure to obtain a written name request was fatal to his case because it would mean that he does not fall within by-law 3.03 because there was no evidence that the employer had ever intended to name hire the complainant. Thus, it was said that he could not prove that there had been discrimination against him. Further, it was submitted that under article 3.08, the Business Manager has ample discretion to make the kind of arrangement that was made with Majestic in this case.

The Decision

17. The Board has recently dealt with the issue of the impact of union by-laws on a section 69 complaint. In the *Thomas Beck* case, *supra*, the Board explained as follows:

22. The role of the Board in assessing the merits of a complaint alleging a violation of section 69 is to decide whether a union which is subject to that section acted in a manner that is arbitrary, discriminatory or in bad faith. In making that decision, the Board may have to ascertain whether certain hiring hall rules or union by-laws have been violated. However, it is not the function of the Board to determine whether there has been a violation of a union's rules or by-laws. *A. J. Roberts*, [1974] OLRB Rep. March 169 at 172; *Ontario Hydro*, [1980] OLRB Rep. July 1039 at 1043; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775 at 1781-82. It need only do so where that determination will be relevant to the issue of whether the

respondent's conduct was arbitrary, discriminatory or in bad faith. (See *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014 at 2023.)

23. The complainant argues that the respondent's business manager had no authority to waive the strict requirements of the hiring hall rules or by-laws, and further that such authority could only come from a new by-law passed by the membership. In our view, whether the business manager did have the actual authority under the respondent's constitution, by-laws or hiring hall rules to do what he did is not the issue. Mr. O'Ryan clearly thought he did have the authority to decide to exercise some discretion in applying the hiring hall rules, and acted in a way which he thought would benefit the respondent and its membership. Indeed, there had previously been waivers of the referral slip requirement and there was no evidence put before the Board to suggest that such conduct had been challenged as being in violation of the laws of the respondent.

24. The Board faced a similar type of argument in *Rupert S. Martin*, [1977] OLRB Rep. 671 at 675:

If under the respondent's constitution or bylaws the decision made by Mr. Morris should in fact have been made by some other person or body (and the Board would note that there is no evidence before it to this effect) then it was always open for the complainant, as a union member, to seek to ensure that the constitution or bylaws were being adhered to either by going through the internal process of the union or possibly by taking the matter into the Courts. While this Board has the authority under the Act to determine whether or not a union has violated its duty under section 60a [now 69], it does not have the authority to police union constitutions and bylaws. This is not to say, however, that *where a union's constitution or bylaws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or bylaws*, that those actions might not be a relevant factor in determining whether or not a breach of section 60a has occurred. Mr. Morris' actions in this case clearly did not come within this class of conduct.

[emphasis added]

18. Like in the *Thomas Beck* case, this Board is asked to deal with a union's conduct in light of its by-laws and to determine whether this amounts to a violation of section 69 of the Act. If we were to assume, without deciding, that the union's conduct in this case does amount to a violation of its hiring hall by-laws, we must still ask whether this would amount to conduct which is arbitrary, discriminatory or in bad faith with regard to the complainant. The evidence makes it clear in this case that the union's decision and practice to limit the amount of name hires on projects is a conscious policy adopted to protect its members on the out-of-work list. While the union recognizes that its more enterprising members can avoid the out-of-work list by persuading contractors to hire them directly, the union has decided to limit the availability of this route so that members who have been out of work the longest still have a chance of obtaining work. Further, the evidence before the Board is that this is an established practice of the union and is used on pipeline as well as other projects. There is no evidence to suggest that this type of practice was utilized for the first time on this project, that it was utilized to thwart any efforts of the complainant personally, or that this conduct had been challenged ever before as being a violation of its own by-laws. Thus, there is no evidence to establish that the union acted arbitrarily, discriminatorily or in bad faith in this case.

19. Having decided that, it is still appropriate to comment further upon the evidence by way of *obiter dicta*. It was clear from the evidence of Mr. Reis and Mr. McKinnon that after obtaining the opinion of their lawyers they were aware that they would be obliged to

honour any name requests if Majestic submitted any to the Local. However, it is equally clear that they neglected to inform the complainant of this fact. Further, they say that had the complainant submitted such a name request they would have honoured it. One can only say that it was unfortunate that they never communicated this information to the complainant. Had they done so, certainly the concerns of the complainant would have evaporated and Majestic's true intentions would have become known. However, their failure to do so, albeit unwise and unprofessional, cannot be considered to be conduct which makes them fall within the ambit of section 69.

20. Therefore, on the basis of the foregoing reasons, this complaint must be dismissed.

1313-84-U Catherine Whittaker, Complainant, v. Service Employees Union Local 268, Respondent, v. The McCausland Hospital, Intervener

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Whether unlawful failure to represent discharged employee – Nineteen month delay in filing complaint bound to prejudice respondent – Board refusing to entertain complaint

BEFORE: *E. Norris Davis*, Vice-Chairman, and Board Members *W. H. Wightman* and *L. C. Collins*.

APPEARANCES: *Robert T. E. Somerleigh* for the complainant; *James K. McDonald* and *Larry O'Brien* for the respondent; *G. L. Firman*, *Barbara DeJonghe* and *Don Ross* for the intervener.

DECISION OF THE BOARD; April 11, 1985

1. This is a complaint filed on August 20, 1984 alleging a violation of sections 68 and 70 of the Act in that on or about January 20, 1983, the grievor was dealt with by Larry O'Brien, President of the respondent, contrary to the provisions of sections 68 and 70 of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent discourage the complainant from filing a written statement of grievance with the McCausland Hospital, claiming that she was unjustly discharged by the said McCausland Hospital; further, the said Larry O'Brien failed to provide the complainant with the forms necessary to processing such grievance with the McCausland Hospital; further, the respondent failed to represent the complainant's interests in the matter of her discharge by the McCausland Hospital, although it was fully aware that the complainant believed her discharge to be wrongful and the reasons for such belief. The respondent, at the outset, moved for dismissal of the complaint on the grounds that, on its face, there had been extreme delay in the filing of the complaint such as should cause the Board to refuse to exercise its discretion under section 89, and further that the complaint, on its face, did not disclose a *prima facie* case of a contravention. The Board ruled that under all the circumstances the complainant should be called upon to lead evidence in respect to the circumstances surrounding the delay in the initiation of the complaint prior to an inquiry into the merits of the complaint.

2. The complainant was employed by the intervening Hospital since May 1979 until January 6, 1983 when a letter was written her and sent by registered mail, stating:

Your employment at the McCausland Hospital is terminated effective Jan. 6th, 1983.

You have been unable to fulfill the scheduling obligations of a casual employee.

This letter was received on January 7th or 8th and the complainant's husband then phoned Mr. Larry O'Brien, President of the respondent union, and asked if he was aware that Mrs. Whittaker had been discharged, to which O'Brien stated he was. Mr. Whittaker asked what he was going to do about it and O'Brien responded that this was a matter between the union and Mrs. Whittaker and not involving Mr. Whittaker. Mr. Whittaker then said, Okay and the conversation was terminated. During that conversation, Whittaker testified he had not asked O'Brien to investigate the matter, or to file a grievance nor did he tell him that Mrs. Whittaker wanted to file a grievance. Mr. Whittaker had no further contact with O'Brien or with anyone in the union between that one phone call and August 14, 1984 being the date on which the complaint was signed (and subsequently filed August 20, 1984). Whittaker testified his wife was incapacitated by illness from January 1, 1983 for a period of 7-14 days.

3. Whittaker stated he and his wife wanted to find out why she had been terminated and accordingly retained a lawyer (not counsel now appearing). Mrs. Whittaker attended at the lawyer's office and, in the result, a letter dated January 18, 1983 was directed to McCausland Hospital reading:

I am Mrs. Whittaker's solicitor.

Mrs. Whittaker has asked me to enquire regarding the payment of termination pay. It is my understanding from talking to Ontario Ministry of Labour officials that two weeks' termination pay should be paid in Mrs. Whittaker's circumstances.

Mrs. Whittaker is also not clear as to why she was terminated. She has advised me that except for illness, she was available for her work assignments.

Would you please advise me as to your position regarding the above matters at your earliest convenience.

Whittaker, in obviously hearsay evidence, testified that the lawyer had received a verbal response to the letter from another solicitor around January 21, 1983 in which it was stated they had a lot against her and she would receive no severance pay unless it was dropped. The Whittakers were then advised by the solicitor that if they wished to proceed further, they should seek other counsel and, as a consequence, counsel appearing in this current proceeding was retained.

4. In the meantime, on January 26, 1983 there was a telephone conversation with O'Brien initiated by Mrs. Whittaker. Her recollection of the conversation was that after she had asked O'Brien if he were aware of her termination and he stated he was, she then asked what he was going to do about it and the response was nothing. She queried nothing? and he replied Yep - are you aware that you have to file in five days? and she acknowledged she was so aware but had been sick. She testified that O'Brien mentioned there was a lot against her without expanding on it and that at some stage she said if you are not going to help me,

I'll have to go to Court and O'Brien's response was go ahead. She was asked in direct examination whether grievance forms had been mentioned in the conversation and responded no. When asked how grievance forms came to be sent to her, she stated, He said you left it too long. We will send the forms but there is no hope. In cross-examination she was asked why she did not ask the union to find out the reason for her termination rather than retaining a lawyer for that purpose and stated that it was in the conversation with O'Brien that such a request had been made and that we asked the union to find out why and then we went to Paget (the first lawyer). Mrs. Whittaker's recollection on this point is obviously faulty as the evidence is clear that the Paget letter was written some eight days before the conversation with O'Brien. She acknowledged that O'Brien had indicated it would be difficult to win a grievance and she agreed that he did not refuse to process a grievance, although later in her testimony she stated that while he had not refused, he didn't encourage me either. When asked the first time you or anyone on your behalf asked to have a grievance processed was when this complaint was filed she acknowledged that's right.

5. O'Brien's recollection of this phone conversation was that what he had said was that the time limits had been violated and the prospects were not too good but we will process it anyway. At the hearing he stated that the time limit was obviously going to be a cause for concern although he did not view it as a difficult problem. He stated the main part of the conversation was the matter of the timeliness of the grievance and that Mrs. Whittaker had introduced a previous disciplinary incident of some four months previously but that he did not discuss that in the context of her termination. He stated he had said I'll forward a grievance form to you. You sign it and we'll take it to the arbitration stage. He also stated that he had not been personally involved in the previous incident beyond being informed of it in a telephone conversation with Mrs. Whittaker in which he informed her he would send his assistant, Elaine Harris, to investigate the matter and that he was not personally aware as to any complaint arising out of the resolution of that matter.

6. On January 27, 1983, the day following the conversation, a letter was directed to Mrs. Whittaker over Mr. O'Brien's name and signed per Elaine Harris reading as follows:

Dear Mrs. Whittaker:

Further to our conversation of yesterday, please find enclosed a Grievance in regard to your dismissal from McCausland Hospital approximately three weeks ago.

However, I wish to point out to you, that according to Article 12.01 of the Collective Agreement, a Grievance must be lodged within five days after the employee ceases to work for the Corporation.

If you wish to process this Grievance, please sign all four copies of the Grievance where it says Grievor Signature, date all four copies and deliver them to Mr. Don Ross, Administrator of McCausland Hospital.

Trusting you will find this satisfactory.

The enclosed grievance form in Mrs. Whittaker's name had been prepared by the union and detailed particulars of the proposed grievance as I grieve that I have been unjustly dismissed, and the adjustment requested as I request that I be re-instated to my former job with full compensation for all time lost during the processing of this grievance.

7. No action was taken by Mrs. Whittaker to complete the grievance form or to file it and there were no further contacts by her with any union representative prior to the filing of the present complaint. In respect to the instructions in the letter of January 27th for Mrs. Whittaker to herself deliver the completed grievance to the Hospital Administrator, it is to be noted that this was in accordance with Article 12.01 of the collective agreement in effect at the time and which expired June 1, 1983 which reads:

12.01 A claim by a permanent employee that he or she has been unjustly discharge [sic] shall be treated as a Grievance if a written statement of such Grievance is lodge [sic] by the employee with the Administrator or his authorized deputy of the Corporation within five days after the employee ceases to work for the Corporation. Such Grievance will be taken up at a special meeting with the Union Committee.

As to the reason for the inaction, it was Mrs. Whittaker's conclusion that the grievance form was a useless piece of paper in view of O'Brien's comment in the letter relative to the time limits for filing. Mrs. Whittaker, when asked about not signing the form, stated O'Brien had said it had been left too long which she interpreted to mean why bother, and again, O'Brien's attitude was it was useless. I believed him when he said it was too late.

8. The complainant then retained Mr. Somerleigh and on April 6, 1983 an action was initiated in the District Court against the McCausland Hospital alleging wrongful dismissal. O'Brien testified that at some time prior to the actual commencement of that proceeding he had a phone conversation with Somerleigh in which O'Brien was advised of the impending court action. In that conversation O'Brien stated there was no reference to the question of union representation and that his (O'Brien's) only comment to Somerleigh was that she had access to the grievance procedure and that is what she should follow. The action in the District Court was dismissed on February 6, 1984 for want of jurisdiction in the face of the existence of the collective agreement, and the matter of costs was ultimately disposed of on March 29, 1984.

9. The Board's approach to complaints not filed in a timely fashion is well stated in its decision in *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420 in paragraphs 21 and 22. It is also established that the Board, in respect to an unreasonable delay in filing a complaint will, for the most part, consider that as a factor in fashioning remedial relief. However, where in the opinion of the Board the time delay has transcended the bounds of a reasonable period and constitutes an extreme delay without mitigating circumstances, the Board will refuse to entertain the complaint. See *CCH Canadian Limited*, [1977] OLRB Rep. June 351 referred to in *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113. A delay, as in this case of nineteen months, is bound to carry an element of prejudice because, as has been said, memories fade and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it requiring the litigation of certain events, remains pending.

10. We are of the opinion that the present case is one in which the Board should exercise its statutory discretion to refuse to entertain the complaint. To whatever extent the events detailed in the complaint might be found a case for a section 68 proceeding, they antedated by nineteen months the filing of the complaint and were some twenty-six months past at the time the matter was brought in for hearing. That passage of time clearly prejudices the respondent in preparing a defence, since the respondent had no indication of any kind during

the entire nineteen-month period that any complaint as to its conduct was impending. In this regard it is also noted that Elaine Harris, who would have been a principal witness in the respondent's case, is no longer in the employ of the respondent. During the nineteen-month period, the complainant was represented by counsel who was, early on, advised by the respondent that rather than pursuing the matter on a claim of wrongful dismissal in the Courts, the proper course was to pursue it in the grievance procedure. While that advice was not followed, what is of significance to us is that this provided a clear opportunity for the complainant's solicitor to raise with the union any issue of the quality of its representation and the issue was not raised then or later. While the complainant must be entitled to explore and pursue all available avenues of redress, that activity in itself, not involving the respondent union and without notice to the respondent union that there was a question of the propriety of its conduct cannot, beyond a reasonable period of time, be used to justify the delay in proceeding against the union. For those reasons the complaint is dismissed.

11. We feel constrained to note that while the complaint sets forth that the said Larry O'Brien failed to provide the complainant with the forms necessary to processing such grievance, the evidence heard by the Board was unequivocal that such forms were provided by the respondent and received by the complainant following the telephone conversation of January 26, 1983. There is no doubt that the failure to initiate a grievance was due to the non-action of the complainant and not to the refusal of the respondent to handle it. While the complainant relates this non-action to her conclusion that the matter would not be vigorously prosecuted, we are of the opinion that O'Brien acted reasonably in pointing out to her the weaknesses in the case, while at the same time advising her that it would be pursued to the arbitration stage. It was her decision not to file a grievance in January 1983, and all the circumstances from that time to the filing of the complaint were consistent with that decision. She thereby precluded any question of the union's representation of her in the grievance procedure from arising.

1835-83-U The Windsor Newspaper Guild Local 239, The Newspaper Guild (CLC-AFL-CIO), Complainant, v. **The Windsor Star**, Respondent

Duty to Bargain in Good Faith – Remedies – Unfair Labour Practice – Prior decision finding bad faith bargaining – Directing employer to provide union information as to salary currently paid to each unit employee – Salary not including variable weekly payments made on top of fixed compensation – Board finding order complied with

BEFORE: *E. Norris Davis*, Vice-Chairman, and Board Members *J. A. Ronson* and *W. F. Rutherford*.

APPEARANCES: *John K. Pistor* and *Doug Firby* for the complainant; *Leonard P. Kavanaugh*, Q.C., *Carl Morgan*, *Art Kainz* and *James Bruce* for the respondent.

DECISION OF THE BOARD; April 25, 1985

1. This is an allegation by the complainant that the written decision of the Board dated December 20, 1983 (now reported at [1983] OLRB Rep. Dec. 2147) wherein the Board directed the respondent to supply certain information to the complainant has not been complied with by the respondent. In its previous decision the Board found that

. . . the refusal of the respondent employer to provide the union with *the salary currently paid to each individual in the bargaining unit* constitutes a breach of the duty to make every reasonable effort to conclude a collective agreement under section 15 of the Act . . . we hereby direct the respondent to provide the complainant union with a list of salaries paid to each named individual in the bargaining unit . . .

Following that decision of the Board, the respondent provided the union with a tabulation of individual employees and their individual salary rates, together with some allied information. The tabulation encompasses some 90 employees including three employees for whom the information provided to the union is alleged to have been incorrect. This apparent discrepancy in information was only noted by the union subsequent to the conclusion of a first collective agreement in April 1984, as a result of the union becoming aware that three employees, Otto Stein, Jim Phillips and Bill Hickey, had, concurrently with the collective agreement rates being made effective, had a component of their compensation package removed. A written grievance was filed April 24, 1984 and is currently pending arbitration. By letter dated November 14, 1984 to the Registrar the union requested the Board to consider whether the employer fully complied with the Board's order of December 20, 1983 and requested that the Board order the employer to continue paying the affected employees the full amount of their compensation in view of the fact negotiations have already been concluded.

2. At the outset of the hearing, the Board pointed out that where the Board exercises its discretion under section 89 of the Act to issue an Order, that Order is enforceable by filing in the Supreme Court, and that where there is an allegation of non-compliance with the Order, the Board will enquire into such allegation and if, in its opinion, it is well-founded, the Registrar is directed to file the Order in the Supreme Court. The Board ruled that pursuant to section 89(6), it had no alternative enforcement jurisdiction.

3. Prior to the conclusion of a collective agreement in April 1984, employees in the bargaining unit, in general, received a weekly salary in respect to the normal work week and if they worked on a shift commencing between 7:00 p.m. and 7:00 a.m., received an additional \$5.00 for each such shift and also received overtime payments for work beyond the normal hours. The information supplied by the respondent, pursuant to the Board's direction of December 20, 1983, showed the rate of weekly salary paid to each employee in the bargaining unit. In respect to the three employees with whom we are here concerned, in addition to the amount shown as rate of weekly salary, each of them were also in receipt of an amount of \$25.00 per week which the complainant claims should have been included in the rate of weekly salary information provided by the respondent and was not so included.

4. The circumstances out of which the \$25.00 payment arose varied as between the three individuals as did the conditions of payment. For that reason, we shall examine each separately.

5. In the case of Mr. Hickey, when first employed, he worked a shift commencing at 5:30 a.m. and, in accordance with the then existing employer policy, received a shift

differential payment of \$5.00 for each shift worked, so that in a regular work week the shift differential payments equalled \$25.00. Some 3 to 3-1/2 years ago, Hickey was transferred to a shift commencing at 10:00 a.m., which shift did not qualify for shift differential within the then existing policy. Hickey raised that matter with his superior at that time and it was agreed that the 10:00 a.m. shift was not a very desirable shift and that Hickey would continue to receive \$5.00 per shift for each shift worked. Hickey testified that under that arrangement, if he did not work a shift, he did not receive the \$5.00 payment and that if he worked a shift which fell in the then employer's general policy for payment of shift differential, he did not receive an additional payment. It was his testimony that he seldom claimed overtime payments and, despite regularly working through his lunch break, was not paid additional. When asked if the \$5.00 payment was some compensation for overtime, he replied, No. Just for the oddball shift. When asked if he had viewed the \$5.00 per day as additional to his basic salary, his response was, I guess I would. I regarded it as compensation for an off-shift. When his attention was directed to the fact that the information supplied to the union in December 1983 indicated his salary to be \$695.00, he stated, I regarded it as my salary. He stated that since the conclusion of the collective agreement in April 1984, he qualifies for and claims overtime and qualifies for a night differential of \$7.00.

6. Mr. Otto Stein testified that he has been in his present job since December 1981, and at the time he was offered the job as Saturday Editor, he was aware that his predecessor had received \$25.00 per week. There was some discussion of this with his superior and it was ultimately agreed that he would receive the \$25.00 per week, although the details were never fully canvassed. He stated that at the start of the job he came in on Wednesday nights for 3 or 4 hours on half a dozen occasions, and worked on two to four occasions on a Friday night shift from 11:00 p.m. to 6:30 a.m. He believed that he had claimed for overtime worked, although it did not happen often. As to the \$25.00 payment, he understood it did not apply to weeks in which he was not actually working such as vacations and sick leave. He was asked if he had received an additional \$5.00 shift differential when working a night shift, and replied, I don't think it ever happened. I doubt that I would. The Friday nights I worked I got nothing extra. His attention was drawn to the fact that the company had supplied the union with information that his salary was \$683.00 per week and that such figure did not include the \$25.00. He testified that while the \$25.00 was part and parcel of the job, the base figure certainly was \$683.00 and that he would say that \$683.00 represented his current wages. He stated he did not always claim for overtime prior to the collective agreement and that while he thought the amount of overtime worked by him in 1983 would be similar to the amount he worked in 1984 subsequent to the collective agreement, he testified he had made no overtime claim in 1983, and in 1984 had received \$3400.00 in overtime payments. In re-examination he stated, I would certainly consider \$683.00 my base salary, and as to the payment of \$25.00 per week he stated, we never talked about \$5.00 per day but talked about \$25.00 per week less \$5.00 per day if not at work.

7. Mr. James Phillips became Entertainment Editor in January 1981 as a result of a job posting. At that time he met with two company representatives, during which a money offer was made to him at which he balked, and, in the result, the company representatives said, we can give you this and \$25.00 more. When asked in examination what the \$25.00 was for, he stated, it was just a carrot they put out. He testified that if he had been shown that the company had said his salary was \$683.00 in December 1983, he would have said, in my opinion, I make more than that. He testified that he had thought that the \$25.00 was folded into his salary and that he thought the \$25.00 would be paid every week without fail.

He testified there were only three weeks out of 52 in which he did not receive the \$25.00 but acknowledged that there were other weeks, such as where there was a public holiday, in which he received a lesser amount. He stated as his opinion he should have received \$25.00 every week but that he had not really checked it. He acknowledged that when entering the job he was told that it involved some night work, some split shifts, one to two hours Sunday night, and early starting every Friday. He stated that prior to the collective agreement, he had worked shifts starting between 7:00 p.m. and 7:00 a.m. and did not receive the \$5.00 shift differential established by the employer's policy.

8. Excerpts from the employer's payroll records for the pay periods ending December 24, 1983, December 31, 1983 and January 7, 1984 were accepted as exhibits, together with the time sheets initiated by the Editorial Department and forwarded to the Payroll Department for the same periods. Those records, in respect to Mr. Hickey, indicate that in the period ending December 24, 1983, he received a total of \$720.00 for 37.5 hours worked and made up of \$695.00 reg. day S.T. and \$25.00 identified as Night Differential; in the period ending December 31, 1983 he received a total of \$695.00 for 7.5 hours worked and 30 hours vacation and nothing identified as shift differential; in the period ending January 7, 1984, he received a total of \$715.00 made up of \$695.00 for 37.5 hours worked and \$20.00 identified as night differential.

9. The records in respect to Mr. Stein indicate that in the period ending December 24th, he received a total of \$708.00 for 37.5 hours worked and made up of \$683.00 for reg. day S.T. and \$25.00 identified as shift differential; in the period ending December 31st, he received a total of \$683.00 for 7.5 hours worked and 30.0 hours identified as vacation and nothing identified as shift differential; in the period ending January 7, 1984 he received a total of \$698.00 for 30.0 hours of work and 7.5 hours of vacation, and \$15.00 identified as shift differential.

10. The records in respect to Mr. Phillips indicate that in the period ending December 24, 1983 he received a total of \$708.00 made up of \$683.00 for 37.5 hours worked at reg. day S.T. and \$25.00 identified as night differential. In the period ending December 31st, Mr. Phillips received a total of \$698.00 made up of \$683.00 for 37.5 hours worked and \$15.00 identified as night differential. In the period ending January 7, 1984 he received a total of \$703.00 made up of \$683.00 for 37.5 hours worked and \$20.00 identified as night differential.

11. The evidence establishes that each of the three named individuals, at the time of the Board's order, received weekly a fixed amount and a variable amount which latter was dependent on the number of days actually worked in a given week. Despite the fact that the *raison d'être* for the variable amount was related to the working hour demands of the individual jobs those persons occupied, and which were not uniform to all three jobs, there is no question but that the variable amount was calculated and administered for payroll purposes uniformly in respect to all three. Over the period of time during which the arrangement was in effect (going back to January 1981 in the case of Phillips, December 1981 in the case of Stein and for 3 – 3-1/2 years in the case of Hickey), the reduction of the variable amount was reflected several times each year in weeks in which public holidays fell, and the total elimination of the amount was reflected during vacation weeks or any other weeks in which no work was performed. We are satisfied that the variable characteristic and the bases of variation was known and understood by the employees affected. We are also satisfied that,

following the individual arrangements, none of the three individuals received or expected to receive payment of the shift differential under the terms of the employer's policy then in force.

12. The Board's order of December 20, 1983 directed the respondent to provide the complainant union with a list of the salaries paid to each named individual in the bargaining unit. It is argued by the complainant that compliance with that direction required the respondent to have provided information in respect to both the fixed amount and the variable amount of compensation; in other words, that the words used by the Board of salaries paid to each named individual had such meaning. We are unable to agree to that proposition.

13. The primary meaning of the word salary refers to a fixed periodical payment to an employee for services. In the employment environment there may be many conditions of work occurring sporadically, or selectively, amongst employees, that the employment arrangement recognizes as being worthy of compensation additional to the basic compensation during the period an employee is subject to those conditions. Compensation payments so made are not generally viewed as a change in salary which is the fixed amount paid. In our view the payment of amounts subject to variation from week to week to the three named individuals were clearly a compensation component separate and distinct from their salaries. It therefore follows that the respondent, in supplying the information which it did to the complainant, was in compliance with the Board's order of December 20, 1983, and the Board so finds.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1985

BARGAINING AGENTS CERTIFIED

NO VOTE CONDUCTED

0653-84-R: United Steelworkers of America, (Applicant) v. Canadian Timken, Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in St. Thomas, Ontario, save and except assistant supervisors and persons above the rank of assistant supervisor, guards, power plant Engineers, Technologists and Engineers, industrial nurse, co-ordinator – employee benefits, executive secretary, personnel records clerk, industrial engineering technician, senior accounting clerk, senior secretary – marketing division, budget and cost analyst, statistical clerk, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement between the respondent and the applicant and its local union no. 4906. (64 employees in unit).

0781-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. C.W.A. Contracting (London) Limited, (Respondent).

Unit #1: all construction labourers' in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

Unit #2: all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman. (2 employees in unit).

1764-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Bapo Enterprises Limited c.o.b. as Anchor Inn & Marina, (Respondent).

Unit #1: all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (4 employees in unit).

Unit #2: all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (4 employees in unit).

2490-84-R: Ontario Nurses' Association, (Applicant) v. The Villa Private Hospital Limited, (Respondent).

Unit #1: all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Vaughan save and except the Director of Nursing, those above the rank of Director of Nursing, and persons regularly employed for not more than twenty-four (24) hours per week. (7 employees in unit).

Unit #2: all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Vaughan for not more than twenty-four (24) hours per week, save and except the Director of Nursing, and those above the rank of Director of Nursing. (4 employees in unit).

2814-84-R: The Canadian Union of Public Employees, (Applicant) v. Cobourg District General Hospital Association, (Respondent) v. Ontario Public Service Employees Union, (Intervener) v. Group of Employees, (Objectors).

Unit #1: all office and clerical employees of the Respondent in Cobourg, save and except supervisors, persons above the rank of supervisor, secretary to the Administrator, secretary to the Program Director – Mental Health Centre, secretary to Director of Finance, Paramedical Employees, persons not regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of January 18, 1985. (29 employees in unit). (*Having regard to the agreement of the parties.*)

Unit #2: (*See: Bargaining Units Certified Subsequent to a Post-Hearing Vote*).

Unit #3: (*See: Applications for Certification Dismissed - No Vote Conducted*).

2883-84-R: Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Barouh Eaton (Canada) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, quality control staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (119 employees in unit). (*Having regard to the agreement of the parties.*)

2916-84-R: Ontario Public Service Employees Union, (Applicant) v. Cobourg District General Hospital Association, (Respondent) v. Group of Employees, (Objectors).

Unit #1: all paramedical employees of the respondent in Cobourg, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of January 29, 1985. (12 employees in unit). (*Having regard to the agreement of the parties.*)

Unit #2: all paramedical employees of the respondent in Cobourg regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of January 29, 1985. (3 employees in unit). (*Having regard to the agreement of the parties.*)

2948-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Bomar Coating Inc., (Respondent).

Unit: all employees of the respondent in Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (31 employees in unit). (*Having regard to the agreement of the parties.*)

2958-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. McKeen-Willis Foods Markets Ltd., (Respondent).

Unit: all employees of the respondent at Ottawa, save and except store manager, persons above the rank of store manager, office and clerical staff. (41 employees in unit). (*Having regard to the agreement of the parties.*)

2960-84-R: The Canadian Union of Public Employees, (Applicant) v. Board of Management of Metropolitan Toronto Zoo, (Respondent).

Unit: all employees of the respondent in Metropolitan Toronto, save and except supervisors, curators, persons above the ranks of supervisor and curator, secretaries to the General Director and Director of Live Collection and Director of Finance and Personnel, any other person performing confidential and labour relations functions in the personnel branch, paymaster, nursing staff, security guards, and employees in the bargaining units for which trade union held bargaining rights as of February 4, 1985; and persons working for the Metropolitan Toronto Zoological Society. (28 employees in unit). (*Having regard to the agreement of the parties*).

2974-84-R: United Headwear and Optical Allied Workers of Canada, Local 4, (Applicant) v. Aoco Limited/Limitee, (Respondent).

Unit: all employees of the respondent at Hamilton, save and except forepersons, persons above the rank of foreperson, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (12 employees in unit). (*Having regard to the agreement of the parties*).

3013-84-R: Canadian Union of Public Employees, (Applicant) v. V.S. Services Limited, (Respondent).

Unit #1: all employees of the respondent employed at the Glebe Centre Inc. in Ottawa, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and employees in the bargaining units for which any trade union held bargaining rights as of February 5, 1985. (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: all employees of the respondent employed at the Glebe Centre Inc. in Ottawa regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and employees in the bargaining units for which any trade union held bargaining rights as of February 5, 1985. (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3030-84-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, (Applicant) v. 3-L Filters Limited, (Respondent) v. Sheetmetal Workers' Conference and Sheetmetal Workers' International Association Local 562, (Intervener) v. Group of Employees, (Objectors).

Unit #1: all employees of the respondent at Cambridge, save and except foremen, persons above the rank of foreman, office, sales and clerical staff and employees at locations other than the respondent's plant No. 1 presently located at 427 Elgin Street North, Cambridge, engaged in a) the fabrication of filter cartridges or b) the distribution and warehousing of filter cartridges and related vessel replacement parts and components. (39 employees in unit).

Unit #2: (*See Applications for Certification Dismissed – No Vote Conducted*).

3038-84-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 27, (Applicant) v. J. B. Allen & Company Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at its Ideal Plumbing Supplies Division at Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period. (17 employees in unit). (*Having regard to the agreement of the parties*).

3044-84-R: United Steelworkers of America, (Applicant) v. I. G. Machine & Fibers Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, security guards, persons working less than 24 hours per week and students employed during the school vacation period. (14 employees in unit). (*Having regard to the agreement of the parties*).

3059-84-R: United Steelworkers of America, (Applicant) v. Exide Canada Corp. (Respondent).

Unit: all employees of the respondent at 3536 Erindale Station Road, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period. (12 employees in unit). (*Having regard to the agreement of the parties*).

3060-84-R: Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. E. T. Cassidy Truck Lines Inc., (Respondent).

Unit: all employees of the respondent at Sudbury, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff. (22 employees in unit). (*Having regard to the agreement of the parties*).

3075-84-R: Teamsters Chemical, Energy & Allied Workers Local Union 424, (Applicant) v. Timminco Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at its Industrial Adhesive Division in the Municipality of Metropolitan Toronto, save and except supervisors, and foremen, persons above the rank of supervisor, and foreman, office, clerical, technical, and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period or on a student cooperative training program. (31 employees in unit). (*Having regard to the agreement of the parties*).

3083-84-R: Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, (Applicant) v. Super Plastics Corporation Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent in the Municipality of Mississauga and Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (89 employees in unit). (*Having regard to the agreement of the parties*).

3090-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Terry Simms Enterprises Ltd., (Respondent).

Unit #1: all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

Unit #2: all carpenters and carpenters' apprentices in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

Unit #2: all carpenters and carpenters' apprentices in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

3144-84-R: International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. Electrix (1984) Company, (Respondent).

Unit #1: all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

Unit #2: all electricians and electricians' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

3150-84-R: Service Employees Union, Local 478, (Applicant) v. Canada Catering Co. Limited, (Respondent).

Unit: all employees of the respondent at Moore Factory Zone Hospital regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except unit manager, persons above the rank of unit manager, dietitian, office staff and persons covered by subsisting collective agreement. (16 employees in unit). (*Having regard to the agreement of the parties*).

3164-84-R: Ontario Public Service Employees Union, (Applicant) v. The Peterborough Civic Hospital, (Respondent).

Unit: all technologists and laboratory assistants of the respondent at Peterborough, Ontario, in its departments of laboratory medicine, radiology and nuclear medicine regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except chief technologists, persons above the rank of chief technologists and persons covered by subsisting collective agreements. (13 employees in unit). (*Having regard to the agreement of the parties*).

3171-84-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Pioneer Youth Services Ltd., (Respondent).

Unit: all employees of the respondent in Kitchener, Waterloo, and Guelph, save and except house managers, persons above the rank of house manager, program co-ordinator, and office and clerical staff. (43 employees in unit). (*Having regard to the agreement of the parties*).

3173-84-R: United Steelworkers of America, (Applicant) v. Work Wear Corporation of Canada Ltd., (Respondent).

Unit: all employees of the respondent in the village of Petawawa, save and except foremen, and persons above the rank of foreman, office and sales staff, route salesmen and students employed during the school vacation period. (38 employees in unit). (*Having regard to the agreement of the parties*).

3201-84-R: Retail Clerks Union, Local 1977. Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A division of Zehrmart Limited, (Respondent).

Unit: all employees of the respondent in its retail store at 385 Waterloo St., New Hamburg, save and except store manager and persons above the rank of store manager. (20 employees in unit). (*Having regard to the agreement of the parties*).

3211-84-R: Labourers' International Union of N.A. – Local 247, Applicant) v. Dustbane Enterprises Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of Modern Building Cleaning, a Division of the respondent, at the Cataraqui Town Centre on 945 Gardiners Road, Kingston, Ontario, save and except supervisors, persons above the rank

of supervisor, office, clerical and sales staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. (14 employees in unit). (*Having regard to the agreement of the parties*).

3215-84-R: Local Union 636, International Brotherhood of Electrical Workers, (Applicant) v. Niagara-on-the-Lake Hydro Electric Commission, (Respondent).

Unit: all office and clerical employees of the respondent at Niagara-on-the-Lake, save and except supervisors, persons above the rank of supervisor, confidential secretary to the Manager, persons employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of February 27, 1985. (2 employees in unit). (*Having regard to the agreement of the parties*).

3224-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 593, (Applicant) v. J B Allen & Company Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at its Ideal Plumbing Supplies Division at London, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period. (8 employees in unit).

3231-84-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. Ryan Mechanicals Limited, (Respondent).

Unit #1: all sprinkler fitters and sprinkler fitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

Unit #2: all sprinkler fitters and sprinkler fitters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

3233-84-R: Canadian Union of Public Employees, (Applicant) v. The Humane Society of Ottawa-Carleton, (Respondent).

Unit: all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Assistant Managing Director, persons above the rank of Assistant Managing Director, secretary to the Assistant Managing Director, secretary to the Assistant Managing Director and secretary to the Managing Director. (6 employees in unit). (*Having regard to the agreement of the parties*).

3237-84-R: Canadian Union of Public Employees, (Applicant) v. Medi Park Lodges Inc., (Respondent).

Unit #1: all employees of the respondent at its Nursing Home, Valley Park Lodge, Niagara Falls, Ontario, save and except professional medical staff, registered nurses, graduate and undergraduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (7 employees in unit). (*Clarity Note*).

Unit #2: all employees of the respondent at its Nursing Home, Valley Park Lodge, Niagara Falls, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, registered nurses, graduate and undergraduate nurses, supervisors, persons above the rank of supervisor and office staff. (17 employees in unit). (*Clarity Note*).

3248-84-R: Upper Ottawa Valley Ambulance Employee's Association, (Applicant) v. Upper Ottawa Valley Ambulance Limited, (Respondent).

Unit: all employees of the respondent in the Village of Petawawa and the Township of Petawawa, in the County of Renfrew. (6 employees in unit).

3272-84-R: United Steelworkers of America, (Applicant) v. Trent Valley Sand & Stone Limited, (Respondent).

Unit: all employees of the respondent at Detour Lake Mine in Northeastern Ontario, save and except foremen, persons above the rank of foreman, office and sales staff. (4 employees in unit). (*Having regard to the agreement of the parties*).

3275-84-R: Ontario Public Service Employees Union, (Applicant) v. The Donwood Institute, (Respondent).

Unit: all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, Ontario save and except department head-medical records, persons above the rank of department head, office manager-fund raising, secretary to the executive director, secretary to the director of administration, persons regularly employed for not more than 24 hours per week and employees in the bargaining units for which any trade union held bargaining rights as of March 6, 1985. (16 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See: Applications for Certification Dismissed No Vote Conducted*).

3276-84-R: Ontario Public Service Employees Union, (Applicant) v. The Donwood Institute, (Respondent).

Unit: all paramedical employees of the respondent in the Municipality of Metro Toronto, Ontario save and except department heads, persons above the rank of department head, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in the bargaining units for which any trade union held bargaining rights as of March 6, 1985. (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: all paramedical employees of the respondent in the Municipality of Metro Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, and employees in the bargaining units for which any trade union held bargaining rights as of March 6, 1985. (7 employees in unit).

3287-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Koehl Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period. (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3289-84-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Delfo Mechanical Ltd., (Respondent).

Unit: all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

3303-84-R: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916; and 2309, (Applicant) v. Lamb Systems Group, a division of F. Jos. Lamb Company Limited, (Respondent).

Unit #1: all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

Unit #2: all millwrights and millwrights' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (6 employees in unit).

3321-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: all office and clerical employees of the respondent in Chatham, save and except assistant branch controller, persons above the rank of assistant branch controller, buyers, dispatchers, payroll supervisor, data receiving co-ordinator, sales personnel, confidential secretaries to the distribution manager and branch manager, persons regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period, and warehouse personnel covered by subsisting collective agreement between the parties effective April 1, 1985 unit March 31, 1987. (22 employees in unit). (*Having regard to the agreement of the parties*).

3325-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Grand Oak Homes Inc., (Respondent).

Unit #1: all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

Unit #2: all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

3329-84-R: Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A Division of Zehr Mart Limited, (Respondent).

Unit: all employees of the respondent at this retail store at 75 King Street South, Waterloo, save and except store manager and persons above the rank of store manager. (75 employees in unit).

3330-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Municipal Plumbing and Heating Ltd., (Respondent).

Unit: all plumbers and plumbers' apprentices in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen and persons above the rank of non-working foreman. (4 employees in unit).

3340-84-R: Ontario Nurses' Association, (Applicant) v. Louise Marshall Hospital, (Respondent).

Unit #1: all registered and graduate nurses employed in a nursing capacity by the respondent in Mount Forest, save and except Co-ordinators, persons above the rank of Co-ordinator, and persons regularly employed for not more than twenty-four (24) hours per week. (9 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: all registered and graduate nurses employed in a nursing capacity by the respondent in Mount Forest regularly employed for not more than twenty-four (24) hours per week, save and except Co-ordinators and persons above the rank of Co-ordinator. (13 employees in unit).

3341-84-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Energy & Chemical Workers Union, Local 914, (Respondent).

Unit: all office and clerical employees of the respondent in Sarnia. (2 employees in unit). (*Having regard to the agreement of the parties*).

3342-84-R; Local 47 Sheet Metal Workers' International Association. (Applicant) v. Coyne Mechanical, (Respondent).

Unit: all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (3 employees in unit).

3343-84-R The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pete & Marty's (College Park) Limited, (Respondent).

Unit #1: all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (5 employees in unit).

Unit #2: all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (5 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0091-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. M & U Masonry Company Limited, (Respondent) v. Labourers' International Union of North America Local 527 and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener).

Unit: all construction labourers in the employ of the respondent in Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (21 employees in unit).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of intervener		19

2394-84-R: Canadian Textile & Chemical Union, (Applicant) v. Alros Products Ltd., carrying on business as Poly tarp Products, (Respondent).

Unit: all employees of the respondent in the Municipality of Metropolitan Toronto save and except office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. (110 employees in unit).

Number of names of persons on revised voters' list		97
Number of persons who cast ballots	91	
Number of ballots marked in favour of applicant		46
Number of ballots marked against applicant		33
Ballots segregated and not counted		12

3062-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Alpha Taxi Limited, (Respondent).

Unit: all dispatchers employed by the respondent in the City of Ottawa save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than twenty-four (24) hours per week. (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		0

2690-84-R: Canadian Chocolate & Confectionery Workers' Union, (Applicant) v. Rowntree Mackintosh Canada Limited, (Respondent) v. Retail, Wholesale, Bakery and Confectionery Workers' Union, Local 461, of the Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Intervener).

Unit: all employees of the respondent, save and except office and sales staff, foreman and foreladies, those above the rank of foreman and foreladies, operating engineers and refrigeration mechanics. (810 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		649
Number of persons who cast ballots	649	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		417
Number of ballots marked in favour of intervener		231

2757-84-R: Canadian Guards Association, (Applicant) v. McMaster University, (Respondent) v. Group of Employees, (Objectors).

Unit: all security officers in the employ of the respondent on its present campus, save and except parking attendants, sergeants and persons above the rank of sergeant. (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of McMaster University Security Officer's Association		1
Number of ballots marked in favour of Canadian Guards Association		12

2812-84-R: Local Union #30, Sheet Metal Workers' International Association, (Applicant) v. Vibron Limited, (Respondent) v. Sheet Metal Workers' International Association, Local Union #540, (Intervener).

Unit: all employees of the respondent at Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff engineering staff, and employees for which Local 30 International Sheet Metal Workers held bargaining rights as of January 18, 1985. (21 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		0

2814-84-R: The Canadian Union of Public Employees, (Applicant) v. Cobourg District General Hospital Association, (Respondent) v. Ontario Public Service Employees Union, (Intervener) v. Group of Employees, (Objectors).

Unit #1: (*See: Bargaining Agents Certified – No Vote Conducted*).

Unit #2: all office and clerical employees of the Respondent in Cobourg regularly employed for not more than twenty-four hours per week and students employed by the respondent in Cobourg as office and clerical employees during the school vacation period, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of January 18, 1985. (12 employees in unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		2

Unit #3: (*See: Applications for Certification Dismissed – No Vote Conducted*).

Unit #4: (*See: Applications for Certification Dismissed – No Vote Conducted*).

2863-84-R: United Steelworkers of America, (Applicant) v. Lenworth Metal Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of Lenworth Metal products Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, and office and sales staff. (91 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		92
Number of persons who cast ballots	86	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		61
Number of ballots marked against applicant		23

Applications for Certification Dismissed – No Vote Conducted

0141-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Lumonics Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent in the City of Kanata, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a university of college co-operative programme. (70 employees in unit).

1353-84-R: United Food and Commercial Workers International Union, (Applicant) v. M. Jeronimo Investments Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel

Employees and Restaurant Employees, Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2). (64 employees in unit).

2495-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Cloydon Construction, (Respondent). (14 employees in unit).

2814-84-R: The Canadian Union of Public Employees, (Applicant) v. Cobourg District General Hospital Association, (Respondent) v. Ontario Public Service Employees Union, (Intervener) v. Group of Employees, (Objectors).

Unit #3: All paramedical employees of the respondent in Cobourg save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of January 18, 1985. (0 employees in unit).

Unit #4: all paramedical employees of the Respondent in Cobourg regularly employed for not more than twenty-four hours per week and students employed by the Respondent in Cobourg as paramedical employees during the school vacation period, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of January 18, 1985. (0 employees in unit).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

3030-84-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, (Applicant) v. 3-L Filters Limited, (Respondent) v. Sheetmetal Workers' Conference and Sheetmetal Workers' International Association Local 562, (Intervener) v. Group of Employees, (Objectors).

Unit #1: (*See: Bargaining Agents Certified – No Vote Conducted*).

Unit #2: all employees of the respondent at Cambridge employed at locations other than the respondent's plant No. 1 presently located at 427 Elgin St. North, Cambridge, engaged in a) the fabrication of filter cartridges or b) the distribution and warehousing of filter cartridges and related vessel replacement parts and components save and except foremen, persons above the rank of foreman, office sales and clerical staff. (1 employee in unit). (*Having regard to the submissions and agreement of the parties*).

3063-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Trizec Equities Limited, (Respondent). (1 employees in unit).

3069-84-R: United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener).

Unit: all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 555 Simcoe Street South, in the City of Oshawa, save and except assistant hostesses and persons above the rank of assistant hostess. (76 employees in unit).

3087-84-R: Service Employees Union, Local 663, A.F. of L., C.I.O., C.L.C., (Applicant) v. M. D. S. Laboratories, (Respondent) v. Group of Employees, (Objectors). (64 employees in unit).

3088-84-R; 3089-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. D & B Watson Sales Ltd, (Respondent). (2 employees in unit).

3203-84-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent). (132 employees in unit).

3260-84-R: Labourers International Union of North America, Local 506, (Applicant) v. The Board of Education for the City of Toronto, (Respondent) v. Operative Plasterers and Cement Mason's International Association, Local 598, (Intervener). (6 employees in unit).

3275-84-R: Ontario Public Service Employees Union, (Applicant) v. The Donwood Institute, (Respondent).

Unit #1: (*See: Bargaining Agents Certified – No Vote Conducted*).

Unit #2: all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, regularly employed for not more than 24 hours per week save and except department head-medical records, persons above the rank of department head, office manager-fund raising, secretary to the executive director, secretary to the director of administration, and employees in the bargaining units for which any trade union held bargaining rights as of March 6, 1985. (5 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2796-84-R: Canadian Paperworkers Union, (Applicant) v. Dominion Cellulose Limited, (Respondent).

Unit: all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period. (363 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		360
Number of persons who cast ballots	344	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		65
Number of ballots marked against applicant		278

2935-84-R: United Steelworkers of America, (Applicant) v. Superior Performance Products (Canada) Inc., (Respondent).

Unit: all employees of the respondent in the Township of East Gwillimbury, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period. (180 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		195
Number of persons who cast ballots	177	
Number of ballots marked in favour of applicant		65
Number of ballots marked against applicant		112

2976-84-R: Canadian Union of Public Employees, (Applicant) v. Modern Building Cleaning A Division of Dustbane Enterprises Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener).

Unit: all employees of Modern Building Cleaning, a Division of Dustbane Enterprises Limited, engaged in cleaning services at Riverside Hospital in Ottawa, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff. (40 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		16

3012-84-R: The Canadian Union of Public Employees, (Applicant) v. Riverside Hospital of Ottawa, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener #1) v. Ontario Public Service Employees Union, (Intervener #2).

Unit: all employees of the respondent in Ottawa, Ontario, save and except Professional Medical Staff, Registered and Graduate Nurses, Paramedical employees, office and clerical employees, office and clerical employees, Supervisors, persons above the rank of Supervisor and persons covered by subsisting collective agreements. It is further noted that the exclusion office and clerical staff does not apply to Ward Clerks and Admitting Clerks. (238 employees in unit).

Number of names of persons on revised voters' list		146
Number of persons who cast ballots	146	
Number of ballots marked in favour of applicant		47
Number of ballots marked in favour of intervener #1		99

3061-84-R: Canadian Transportation Workers Union No. 188 National Council of Canadian Labour, (Applicant) v. Total Recycling Systems Limited, (Respondent).

Unit: all employees of the respondent at Kitchener, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week. (7 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		3

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2620-84-R: Graphic Communications International Union, Local 500-M, (Applicant) v. Mundet Industries Ltd., (Respondent).

Unit: all employees of the respondent in Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office, sales and clerical staff, and persons regularly employed for not more than 24 hours per week. (35 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		27
Ballots segregated and not counted		2

2809-84-R: Retail, Wholesale and department Store Union, AFL:CIO:CLC:, (Applicant) v. First Choice Hair Cutters Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at Sarnia, save and except Assistant Manager and persons above the rank of Assistant Manager. (14 employees in unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		8

2810-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. First Choice Hair Cutters Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at Chatham, save and except Assistant Manager and persons above the rank of Assistant Manager. (9 employees in unit). (*Having regard to the foregoing and the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		7

2887-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. Freightliner of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent in Mississauga, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		5

2899-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. First Choice Hair Cutters Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: all employees of the respondent at Windsor, save and except Assistant Manager and persons above the rank of Assistant Manager. (12 employees in unit). (*Having regard to the foregoing and the agreement of the parties*).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

3151-84-R: Labourers' International Union of N. A. - Loc. 247, (Applicant) v. Modern Building Cleaning - Division of Dustbane Enterprises Ltd., (Respondent). (*Withdrawn*).

3210-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. VS Services Ltd. (Food Service Management Division), (Respondent) v. Hotels, Clubs, Restaurants & Taverns Employees' Union Local 261, (Intervener).

3227-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Valhalla Inn (Thunder Bay), (Respondent).

3261-84-R: Macrila Drivers Association, (Applicant) v. Macrila International Holdings Inc., (Respondent).

3277-84-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada, (Applicant) v. Hamilton Design Sprinklers Inc., (Respondent).

3322-84-R: Teamsters Local Union NO. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Consolidated Fastfrate Transport Group Ltd., (Respondent).

3331-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. VS Services Ltd., (Food Service Management Division), (Respondent).

Applications for Declaration of Related Employer

1226-84-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant)v. Silverwoods Industries Dominion Dairies Limited Ault Dairies, Division of Ault Foods Limited, (Respondent). (*Granted*). (*Having regard to the agreement of the parties*).

2401-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Century Manor, Garth Aselford Developments Limited, J. Walton Martin Developments Limited, Aselford-Martin Limited, Garth Aselford Limited and J. Walton Martin Limited, (Respondents). (*Withdrawn*).

2615-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Uni-Form Builders Ltd., and Uni-Form Developments & Leasing Limited, (Respondents). (*Granted*). (*Having regard to the agreement of the parties*).

3086-84-R: Darigold Products Ltd., (Applicant) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Respondent). (*Withdrawn*).

SALE OF A BUSINESS

1115-84-R: United Food and Commercial Workers, Local 206, Chartered by United Food and Commercial Workers International union, (Applicant) v. Keele-Wilson Supermarket Limited, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

1226-84-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant)v. Silverwoods Industries Dominion Dairies Limited Ault Dairies, Division of Ault Foods Limited, (Respondent). (*Granted*). (*Having regard to the agreement of the parties*).

2576-84-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 Refrigeration Workers of Ontario, (Applicant) v. Lake Refrigeration Inc., and Daemax Refrigeration Inc., and Daemax Refrigeration Ltd., (Respondents). (*Withdrawn*).

2581-84-R: The Women's Christian Association of London, owner and operator of Parkwood Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent).

Unit #1: all registered and graduate nurses employed by The Women's Christian Association of London at Parkwood Hospital, London, in a nursing capacity, save and except Head Nurses, persons above the rank of Head Nurse, persons regularly employed for not more than twenty-four (24) hours per week and employees covered by subsisting collective agreements. (*Granted*).

Number of names of persons on revised voters' list		84
Number of persons who cast ballots	72	
Number of spoiled ballots		2
Number of ballots marked in favour of respondent		51
Number of ballots marked against respondent		18
Ballots segregated and not counted		1

Unit #2: all registered and graduate nurses employed by The Women's Christian Association of London at Parkwood Hospital, London, in a nursing capacity and regularly employed for not more than twenty-four (24) hours per week, save and except Head Nurses and persons above the rank of Head Nurse and employees covered by subsisting collective agreements. (*Granted*).

Number of names of persons on revised voters' list		83
Number of persons who cast ballots	69	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		43
Number of ballots marked against respondent		24
Ballots segregated and not counted		1

2615-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Uni-Form Builders Ltd., and Uni-Form Developments & Leasing Limited, (Respondents). (*Granted*). (*Having regard to the agreement of the parties*).

2782-84-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Exposervice Standard Inc., Standard Electric (Toronto) Inc., Concept Electric Ltd., (Respondents). (*Withdrawn*).

2815-84-R: Ault Dairies, Division of Ault Foods Limited, (Applicant) v. Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Granted*). (*Having regard to the agreement of the parties*).

2894-84-R: International Beverage Dispensers and Bartenders Union, Local 280, (Applicant) v. N.T.G. Holdings Ltd. cob Pine Tree Tavern, (Respondent). (*Granted*).

UNION SUCCESSOR RIGHTS

1571-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Indusmin Limited, Construction Materials Division, Acton Operation, (Respondent). (*Granted*).

1572-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Canada Cement Lafarge Ltd., (Respondent). (*Granted*).

1576-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. J.F. Marshall & Sons (A Division of Standard Industries Ltd.), (Respondent). (*Granted*).

1577-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Custom Aggregates, (Respondent). (*Granted*).

1578-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Canada Cement Lafarge Ltd., (Respondent). (*Granted*).

1579-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Consolidated Sand & Gravel Co. (A Division of Standard Industries Ltd.), (Respondent). (*Granted*).

1582-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. T.C.G. Materials Limited, (Respondent). (*Granted*).

1583-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Canada Building Materials Limited, (Respondent). (*Granted*).

1584-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Century Concrete Products Limited, (Respondent). (*Granted*).

1585-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Richvale Cartage Company Ltd., (Respondent). (*Granted*).

1586-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Dominion Paving, (Respondent). (*Granted*).

1587-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Alderbrook Industries Limited, (Respondent). (*Granted*).

1589-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Lac Minerals Ltd., (Milton Limestone Division), (Respondent). (*Granted*).

1590-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Steed & Evans Limited, Materials Division, (Respondent). (*Granted*).

1591-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. St. Marys Cement Company, (Respondent). (*Granted*).

1592-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Dunnville Rock Products Limited, (Respondent). (*Granted*).

1593-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Sivaco (Ontario) (A Division of Ivaco Inc.), (Respondent). (*Granted*).

1594-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Plastics C.M.P. Ltd., (Respondent). (*Granted*).

1595-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Peterborough Plastics Painters Limited, (Respondent). (*Granted*).

1596-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. St. Mary's Cement Ltd., (Respondent). (*Granted*).

1599-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. King Paving & Materials Ltd., (Respondent). (*Granted*).

1600-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Loc-Pipe Division of George Wimpey Canada Ltd., (Respondent). (*Granted*).

1601-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Westroc Industries Ltd., Drumbo Mine, (Respondent). (*Granted*).

1603-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Work Wear Corporation of Canada Ltd. (Peterborough), (Respondent). (*Granted*).

2936-84-R: Graphic Communications International Union, (Applicant) v. Alcan Canada Foils, a Division of Alcan Canada Products Limited, (Respondent). (*Granted*).

3033-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Clarex Manufacturing, A Division of Clareco Manufacturing Inc., (Respondent). (*Granted*).

3034-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Kawartha Moulding Limited, (Respondent). (*Granted*).

3190-84-R: Graphic Communications International Union, Local 477-C, Peterborough, (Applicant) v. The Peterborough Examiner Division of Thomson Newspapers Limited, (Respondent). (*Granted*).

3192-84-R: Graphic Communications International Union, Local 375-C, Thunder Bay, (Applicant) v. The Chronicle-Journal/The Times-News, A Division of Canadian Newspapers Limited, (Respondent). (*Granted*).

3193-84-R: Graphic Communications International Union, Local 436-C, Sault Ste. Marie, (Applicant) v. The Sault Star, (A Division of Southam Inc.), (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2234-84-R: Ed Thomas and a group of employees, (Applicant) v. Teamsters Local Union No. 879, (Respondent).

Unit: all employees of Emco Limited working at the St. Catharines branch, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period. (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

2276-84-R: The union employees at Robert Soper Ltd., (Applicant) v. Amalgamated Clothing and Textile Workers Union (AFL-CIO-CLC), (Respondent).

Unit: all employees at Hamilton, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period. (32 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		30
Number of persons who cast ballots	29	
Number of ballots marked in favour of respondent		17
Number of ballots marked against respondent		12

2510-84-R: William Alexander MacMillan, (Applicant) v. Teamsters Union Local #879, (Respondent) v. Salvation Army Canada East, (Intervener).

Unit: all employees of the respondent in St. Catharines in its hostel operation, save and except administrator and office staff. (11 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of respondent		3
Number of ballots marked against respondent		7

2511-84-R: George Mihailidis, (Applicant) v. Canadian Union of Operating Engineers & General Workers Local 101, (Respondent) v. Midmetro Plastics Limited, (Intervener).

Unit: all employees of Midmetro Plastics Ltd., in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (7 employees in unit). (*Granted*).

2524-84-R: Mary Henriques, (Applicant) v. Teamsters Union Local #879, (Respondent) v. Salvation Army Canada East, (Intervener).

Unit: all employees of the respondent in St. Catharines in its warehousing store operations save and except foreman, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. (14 employees in unit). (*Granted*).

Number of names of persons on revised voter's list		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		7

2553-84-R: John F. Whigham, (Applicant) v. Graphic Communications International Union, Local 542, (Respondent).

Unit: all employees in the employ of L. B. Enterprises, 492398 Ontario Limited in the City of Guelph, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period. (22 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		10
Ballots segregated and not counted		2

2786-84-R: Staff of Rudolph's Specialty Bakeries Limited, (Applicant) v. Retail, Wholesale, Bakery and Confectionary Workers' Union, Local 461, (Respondent) v. Rudolph's Specialty Bakeries Limited, (Intervener).

Unit: all employees of the intervener, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (53 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		51
Number of persons who cast ballots	49	
Number of spoiled ballots		49
Number of spoiled ballots		2
Number of ballots marked in favour of respondent		16
Number of ballots marked against respondent		30
Ballots segregated and not counted		1

2933-84-R: Christian Labour Association of Canada, (Applicant) v. Service Employees' Union, Local 204, (Respondent) v. Bestview Holdings Limited, (Intervener). (179 employees in unit). (*Withdrawn*).

3160-84-R: Gamble Robinson Office Staff Union, Sharon H. Boyce, Natalie S. Martel, Ollie Maurice and Monique J. Aubin, (Applicants) v. Retail, Wholesale and Department Store Union, (Respondent).

Unit: all office and clerical employees of Slade & Stewart Ltd. at Sturgeon Falls, Ontario, save and except office manager, persons above the rank of office manager, secretary to the manager, sales staff and students employed during the school vacation period. (4 employees in unit). (*Dismissed*).

3230-84-R: United Food and Commercial Workers International Union, (Applicant) v. Canadian Union of Restaurant and Related Employees, (Respondent) v. Cara Operations Limited, (Intervener). (58 employees in unit). (*Withdrawn*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

2370-84-M: Spar Aerospace Limited, (Employer) v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 112 UAW, (Trade Union).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3172-84-U: Bird Construction Company Limited and Mollenhauer Limited, Contractors and Engineers, (Applicants) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers – C.L.C. Local 325 Etobicoke and Larry Masiak, Richard Anthony, Andrew Post, Bradley Tripp and James Mullally, (Respondents). (*Dismissed*).

3327-84-U: Lackie Industrial Contractors Ltd., (Applicant) v. J. Richard Soroka, Kingston Building Trades Council, and those persons named in Schedule A hereto, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3222-84-U: Robert Williams, (Applicant) v. Monarch Fine Foods Company Limited, (Respondent). (*Dismissed*).

3382-84-U; and 3396-84-U: Brewery, Malt and Soft Drink Workers, Local 304, and Canadian Union of Brewery and General Workers 325, (Applicants) v. Molson Ontario Breweries Limited, Carling O'Keefe Transport Limited, Carling O'Keefe Breweries of Canada Limited, and Harry F. Weininger, (Respondents). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1285-83-U: Labourers' International Union of North America, Local 1059, (Complainant) v. Joe Franze Concrete Ltd., (Respondent). (*Terminated*).

2053-83-U: Service Employees International Union, Local 183, (Complainant) v. Daynes Health Care Limited, Earl Daynes, (Respondents) v. Group of Employees, (Interveners). (*Granted*).

2174-83-U: Teamsters Local Union No. 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. BrytorInternational, (Respondent). (*Granted*).

2705-83-U; 0248-84-U: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Holiday Juice Ltd., (Respondent). (*Withdrawn*).

0623-84-U: Thomas Beck, (Complainant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Respondent). (*Dismissed*).

0671-84-U: Zorika Flanjak, (Complainant) v. Local 310, Amalgamated Clothing & Textile Workers Union (Shoe Division) and Greb Industries, A Division of Warrington, Inc., (Respondents). (*Dismissed*).

0793-84-U: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Holiday Juice Ltd., (Respondent). (*Withdrawn*).

0999-84-U: Retail, Wholesale & Department Store Union, AFL-CIO-CLC, (Complainant) v. Simpsons Limited, (Respondent). (*Dismissed*).

1182-84-U: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Holiday Juice Ltd., (Respondent). (*Withdrawn*).

1335-84-U: Bernard Dorais, (Complainant) v. The International Alliance of Theatrical and Stage Employees Local 257 Ottawa Ontario, (Respondent). (*Dismissed*).

1526-84-U: Ontario Nurses' Association, (Complainant) v. Edward Street Manor Nursing Home, (Respondent). (*Withdrawn*).

1808-84-U: Carleton Roman Catholic Separate School Board Employees' Association, (Complainant) v. Carleton Roman Catholic Separate School Board, (Respondent). (*Dismissed*).

1829-84-U: Canadian Union of Public Employees, (Complainant) v. Corporation of the Township of Matilda, (Respondent). (*Withdrawn*).

1887-84-U: Mohamed El Sherif, (Complainant) v. C. E. Jamieson & Co. (Dominion) Limited, (Respondent) v. Energy and Chemical Workers Union, (Intervener). (*Dismissed*).

1895-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Plaza II Hotel, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1896-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. The Chelsea Inn, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1898-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Inn on the Park, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1898-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. The Prince Hotel, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1899-84-U: Hotel Employees Restaurant Employees Union, (Complainant) v. The Sheraton Centre Hotel, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1900-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Hampton Court Hotel, (Respondent) v. Hotel Employees Group of Toronto, (Intervener). (*Withdrawn*).

1901-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Ramada Inn Don Valley, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1902-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. The Westin Hotel, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1903-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. The Westbury Hotel, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

1904-84-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Ramada Inn Downtown, (Respondent) v. Hotel Employers Group of Toronto, (Intervener). (*Withdrawn*).

2003-84-U: United Food and Commercial Workers Union and United Food and Commercial Workers Union, Local 114P, (Complainant) v. Canada Packers Inc., (Respondent). (*Withdrawn*).

2218-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. Abode Properties Ltd., and York Condominium Corporation, No. 146, (Respondent). (*Withdrawn*).

2297-84-U: United Electrical, Radio and Machine Workers of Canada (UE), (Complainant) v. Tie/Communications Canada, Inc., (Respondent). (*Dismissed*).

2300-84-U: Amalgamated Transit Union, Local 846, (Complainant) v. The St. Catharines Transit Commission, (Respondent). (*Withdrawn*).

2310-84-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Woodbridge Foam Corporation, (Respondent). (*Withdrawn*).

2349-84-U: Salih Kafadar, (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union 128, (Respondent). (*Withdrawn*).

2382-84-U: Clifton Smith, (Complainant) v. Batronics, Inc., (Respondent). (*Dismissed*).

2405-84-U: Retail, Wholesale & Department Store Union, AFL-CIO-CLC, (Complainant) v. T. Eaton Company Limited, (Respondent). (*Dismissed*).

2532-84-U: United Brotherhood of Carpenters and Joiners of America, Local 3054, (Complainant) v. Robert Hunt Corporation, (Respondent). (*Withdrawn*).

2616-84-U: Ontario Public Service Employees Union, (Complainant) v. Her Majesty the Queen in Right of Ontario, The Honourable Keith Norton, Graham Brand, Fred Rusk, and McKechnie Ambulance Service Inc., (Respondents). (*Withdrawn*).

2619-84-U: Graphic Communications International Union, Local 500-M, (Complainant) v. Mundet Industries Ltd, (Respondent). (*Withdrawn*).

2641-84-U: W. Zarudenec, Walter Dumanski, Frank Canjar, Bronis Trebinskie, Luigi Barbon and Jim Carruthers, (Complainants) v. Local 2251 United Steelworkers of America, (Respondent) v. The Algoma Steel Corporation, Limited, (Intervener). (*Withdrawn*).

2694-84-U: United Food and Commercial Workers International Union, (Complainant) v. Meat Connection Inc., (Respondent). (*Withdrawn*).

2699-84-U; 2700-84-U; 2701-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Factory Carpet, A Division of Carpita Corporation, (Respondent). (*Withdrawn*).

2702-84-U: Hackim Mohammed, (Complainant) v. United Food and Commercial Workers International Union AFL-CIO-CLC, (Respondent). (*Withdrawn*).

2787-84-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Diversey Wyandotte Inc., (Respondent) v. Brewery Malt and Soft Drink Workers, Local 304, (Intervener). (*Dismissed*).

2798-84-U: United Steelworkers of America, (Complainant) v. Home Technics Ltd., (Respondent). (*Withdrawn*).

2817-84-U: The Canadian Union of Public Employees and its Local 265, (Complainant) v. Jewish Family and Child Service of Metropolitan Toronto, (Respondent). (*Withdrawn*).

2827-84-U: Gordon Stevenson, (Complainant) v. Local 597, Labourers' International Union of North America, (Respondent). (*Withdrawn*).

2841-84-U: The Canadian Union of Public Employees and Local Union 210, (Complainant) v. The Corporation of the City of Timmins, (Respondent). (*Withdrawn*).

2848-84-U: Chris Wright, (Complainant) v. Canadian Paperworkers Union Local 307, (Respondent). (*Withdrawn*).

2850-84-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Olympia Floor and Wall Tile Company, (Respondent). (*Withdrawn*).

2868-84-U: Gerard J. Dumouchel, R. R. #3 Box 17, Pembroke, Ont., K8A 6W4, (Complainant) v. United Food and Commercial Workers Local 1000A, (Respondent). (*Withdrawn*).

2892-84-U: Hans Jensen, (Complainant) v. Amalgamated Transit Union Local 107, President Klaas Klad, Recording Secretary Gary Arsenault, (Respondents). (*Withdrawn*).

2917-84-U: Canadian Brotherhood of Railway, Transport and General Workers, (Complainant) v. L'Hotel (C.N. Hotels Inc. c.o.b. as L'Hotel), (Respondents). (*Withdrawn*).

2927-84-U: United Food and Commercial Workers International Union, (Complainant) v. Cara Operations Ltd., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

2928-84-U: United Food & Commercial Workers International Union, (Complainant) v. G. H. Sousa Holdings Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

2929-84-U: United Food and Commercial Workers International Union, (Complainant) v. William Odorico investments Ltd., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

2930-84-U: International Molders & Allied Workers Union, (Complainant) v. Eberhard Hardware Manufacturing Limited, (Respondent). (*Withdrawn*).

2943-84-U: Canadian Union of Operating Engineers & General Workers, Local 222, (Complainant) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Respondent). (*Withdrawn*).

2945-84-U: Retail, Wholesale & Department Store Union, AFL-CIO-CLC, (Complainant) v. G. W. Robinson Co. Ltd., (Respondent). (*Withdrawn*).

2963-84-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Brimac Anodizing Limited, (Respondent). (*Withdrawn*).

2964-84-U; 2965-84-U: Health, Office & Professional Employees, a Division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Sara Vista Nursing Home, (Respondent). (*Withdrawn*).

2966-84-U: Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food and Commercial Workers International Union, (Complainant) v. Green Acres Nursing & Convalescent Home, (Respondent). (*Withdrawn*).

3002-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Calhoun's Restaurant, (Respondent). (*Withdrawn*).

3018-84-U: James W. Hodgins, (Complainant) v. Teamsters Union 647 Employee Benefit Plan Services, (Respondent). (*Withdrawn*).

3019-84-U: Canadian Union of United Brewery, Flour, Soft Drink and Distillery Workers, (Complainant) v. Jaslow Glass Industries Ltd. (c.o.b. Artistic Lighting), (Respondent). (*Withdrawn*).

3020-84-U: Madison Management, (Complainant) v. Christian Labour Association of Canada, (Respondent). (*Withdrawn*).

3072-84-U: Bill Biard, Steward, (Complainant) v. Ontario Hydro Employees Union, (Respondent). (*Withdrawn*).

3079-84-U: Richard Woodruff, (Complainant) v. Teamsters Local 879, (Respondent). (*Withdrawn*).

3082-84-U: Office & Professional Employees International Union, (Complainant) v. Metropolitan Toronto Police Association, (Respondent). (*Withdrawn*).

3112-84-U: United Food and Commercial Workers International Union, (Complainant) v. 485376 Ontario Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

3113-84-U: United Food and Commercial Workers International Union, (Complainant) v. C. Calisto Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

3114-84-U: United Food and Commercial Workers International Union, (Complainant) v. Cabral Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

3115-84-U: United Food and Commercial Workers International Union, (Complainant) v. LML Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

3116-84-U: United Food and Commercial Workers International Union, (Complainant) v. Manuel da Silva Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

3131-84-U: International Union of Operating Engineers, Local 796, (Complainant) v. Ottawa-Carleton Regional Hospital Food Services, (Respondent). (*Withdrawn*).

3134-84-U: Gene M. Lagacy, (Complainant) v. United Autoworkers Union Local 222, (Respondent). (*Withdrawn*).

3140-84-U: John James, (Complainant) v. Hugo Rossini International Representative, Labourers International Union of North America, Labourers International Union of North America, Local 1030 Jimmie Lewis, Business Manager, and O.J. Pipelines, N. Waldbillig, Superintendent, (Respondent). (*Withdrawn*).

3159-84-U: Canadian Union of Public Employees, (Complainant) v. Frost Manor, (Respondent). (*Withdrawn*).

3166-84-U: Glen F. Moores, (Complainant) v. Upholsterers International Union of North America (Local 50), (Respondent). (*Withdrawn*).

3202-84-U: United Food and Commercial Workers International Union, (Complainant) v. J. Paiva Foods Ltd., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Dismissed*).

3220-84-U: George Moore, (Complainant) v. Labourers' International Union of North America, local 183, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3068-84-M: Tiny Tots Knitting Mills Inc., (Employer) v. Amalgamated Clothing and Textile Workers Union, (Trade Union). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEES STATUS

2188-83-M: South Ontario Newspaper Guild, (Applicant) v. Maclean's Magazine, (Respondent). (*Terminated*).

2168-84-M: United Steelworkers of America, on behalf of its Local 2729, (Applicant) v. Commercial Aluminum, Division of Indal Limited, (Respondent). (*Withdrawn*).

2630-84-M: Metropolitan Toronto Library Board, (Applicant) v. Canadian Union of Public Employees Local 1582, (Respondent). (*Withdrawn*).

2849-84-M: The Corporation of the Township of West Carleton, (Applicant) v. Canadian Union of Public Employees, Local 2293, (Respondent). (*Withdrawn*).

2873-84-M: O'Keefe Centre for the Performing Arts, (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local B-173, (Respondents). (*Withdrawn*).

3161-84-M: S. W. Fleming Limited, (Employer) v. Sheet Metal Workers' International Association, Local Union 540, (Trade Union). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1734-84-OH: W.J. McCorkell Ottawa-Carleton Public Employees Union Local 503, C.U.P.E., 2000 Falkirk Cres. Gloucester, Ontario K1B 4Y7, (Complainant) v. P. O'Brien Corporation of the City of Ottawa 1355 Bank Street Ottawa, Ontario K1H 8K7, (Respondent). (*Terminated*).

2693-84-OH: David Flowers, (Complainant) v. Meat Connection Inc., (Respondent). (*Withdrawn*).

2918-84-OH: Richard Folz, (Complainant) v. Arvin Automotive of Canada Ltd., (Respondent). (*Withdrawn*).

3165-84-OH: Ron Morcheck #6596, (Complainant) v. Al. Barry (Supervisor) for Falconbridge Ltd., (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

Unfair Labour Practice

1320-84-U: Joseph C. Grogan, (Complainant) v. Labour Council of Metropolitan Toronto, (Respondent #1) v. Humber College of Applied Arts & Technology, (Respondent #2). (*Dismissed*).

2746-84-U: The Ontario Public Service Employee's Union, (Complainant) v. Sir Sandford Fleming College of Applied Arts & Technology, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

0025-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Power PAC Construction Co. Ltd., (Respondent). (*Withdrawn*).

1293-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Glencoe Insulation Co. Limited, (Respondent). (*Withdrawn*).

1330-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Con Elco Limited, (Respondent). (*Withdrawn*).

1331-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. G. M. Guest Inc., (Respondent). (*Withdrawn*).

1332-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Par-Tex Engineering & Contracting Co. Ltd., (Respondent). (*Withdrawn*).

1333-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. George Wimpey Canada Limited, (Respondent). (*Withdrawn*).

2077-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. P. Carpentry, (Respondent). (*Withdrawn*).

2476-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Appeal Contractors (Respondent). (*Withdrawn*).

2492-84-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. N. L. Smith Construction Group Inc., (Respondent). (*Withdrawn*).

2500-84-M: Lumber and Sawmill Workers Union, Local 2693, (Applicant) v. Kornovski & Keller Constructors Ltd., (Respondent). (*Withdrawn*).

2537-84-M: Laborers' International Union of North America, Local 607, (Applicant) v. Randin Masonry Company Limited, (Respondent). (*Granted*).

2580-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Gilbert Construction (1981) Ltd., (Respondent). (*Granted*).

2613-84-M: Local 200 of the Ontario Council of The International Brotherhood of Painters and Allied Trades, (Applicant) v. Zimmcor Co. of the Architectural Glass and Metal Contractors Association, (Respondent). (*Withdrawn*).

2832-84-M: United Brotherhood of Carpenters & Joiners of America, Local 18, (Applicant) v. Marel Construction Limited, (Respondent). (*Granted*).

2877-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Lake Refrigeration Inc., Daemax Refrigeration Ltd., (Respondents). (*Withdrawn*).

2921-84-M: Labourers International Union of North America, Local 527, (Applicant) v. Uni-Form Builders Ltd., Walter Stenger c.o.b. as Uni-Form Ltd. and Uniform Developments & Leasing Limited, (Respondent). (*Withdrawn*).

2984-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. M. Lesko Insulation Company Limited, (Respondent). (*Withdrawn*).

2986-84-M: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Border Cities Wire and Iron Limited, (Respondent). (*Granted*).

2996-84-M: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Marylou Drywall Limited and Connie Drywall Limited carrying on business as Macon Drywall Systems, (Respondent). (*Granted*).

2999-84-M: International Brotherhood of Painters and Allied Trades, Local 1904, (Applicant) v. Malmeister Painting Ltd. and Victor Zauner c.o.b. as Certified Master Painting, (Respondent). (*Granted*).

3023-84-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Gillespie Restoration Painting Ltd., (Respondent). (*Granted*).

3024-84-M: Millwright District Council of Ontario, (Applicant) v. S. Meehan Millwright Services, (Respondent). (*Granted*).

3040-84-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Exposervice Standard Inc., Standard Electric (Toronto) Inc., Concept Electric Ltd., (Respondents). (*Withdrawn*).

3052-84-M: Local #50 International Union of Elevator Constructors, (Applicant) v. Dover Elevator Company Limited, (Respondent). (*Withdrawn*).

3053-84-M: Local #50, International Union of Elevator Constructors, (Applicant) v. Northern Elevator Limited, (Respondent). (*Withdrawn*).

3058-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. The Second Cup, (Respondent). (*Granted*).

3076-84-M: A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183, (Applicant) v. Metropolitan Toronto Sewer and Watermain Contractors' Association and Clearway Construction Limited and/or Teston Pipelines Limited, (Respondents). (*Withdrawn*).

3078-84-M: Operative Plasterers' and Cement Masons' International Association of United States and Canada Local 598, (Applicant) v. Harbridge & Cross Limited, (Respondent). (*Withdrawn*).

3091-84-M: Labourers' Int. Union of North America, Local 506, (Applicant) v. C. A. Tedesco Waterproofing Inc., (Respondent) v. Operative Plasterers and Cement Masons Local 598, (Intervener). (*Withdrawn*).

3092-84-M: Labourers' International Union of North America, Local 527, (Applicant) v. Ottawa G.S.B. Construction Company Limited, (Respondent). (*Withdrawn*).

3096-84-M: International Brotherhood of Painters and Allied Trades Glaziers Local 175, (Applicant) v. Frank Jonkman and Sons Ltd., (Respondent). (*Withdrawn*).

3098-84-M: United Brotherhood of Carpenters and Joiners of America, local 2486, (Applicant) v. Arneks Construction Ltd., (Respondent). (*Granted*).

3100-84-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Malvern Drywall Systems, (Respondent). (*Withdrawn*).

3107-84-M: Laborers' International Union of North America, Local 607, (Applicant) v. Stebill Limited, (Respondent). (*Granted*).

3108-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bre-Ex Limited, (Respondent). (*Granted*).

3132-84-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Triple-Four Interior Systems Division of 572062 Ontario Inc., (Respondent). (*Granted*).

3133-84-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Tri-form Contracting Ltd., (Respondent). (*Granted*).

3156-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Imperial Caulking and Weather Stripping Inc. and/or Imperial Caulking Ltd, (Respondents). (*Granted*).

3158-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. L & M Caulking Co. Ltd. and/or Gylene Sales and Enterprises Ltd., (Respondent). (*Granted*).

3175-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lednier Construction Company Limited, (Respondent). (*Withdrawn*).

3176-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Di Domizio Construction Limited, (Respondent). (*Withdrawn*).

3177-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Power Pac Construction Company Limited, (Respondent). (*Withdrawn*).

3178-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Limited, (Respondent). (*Withdrawn*).

3179-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Correct Forming, (Respondent). (*Withdrawn*).

3181-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. B and G Concrete Drain Company, (Respondent). (*Withdrawn*).

3242-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Lucy Construction Ltd., (Respondent). (*Granted*).

3243-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Batoni Construction Incorporated, (Respondent). (*Withdrawn*).

3244-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Form Tech Construction, (Respondent). (*Withdrawn*).

3262-84-M: International Brotherhood of Electrical Workers, Local Union 353, (Applicant) v. Agnew Electrical Corporation, (Respondent). (*Granted*).

3268-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Mississauga Plumbing & Heating Limited, (Respondent). (*Withdrawn*).

3269-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Bennett Mechanical Installations, (Respondent). (*Withdrawn*).

3282-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 853, (Applicant) v. Rowan Sprinkler Company Limited, (Respondent). (*Granted*).

3292-84-M: United Brotherhood of Carpenters and Joiners of America, local Union 1669, (Applicant) v. Adam Nedokis, (Respondent). (*Withdrawn*).

3309-84-M: United Brotherhood of Carpenters & Joiners of America, Local #494, (Applicant) v. General Wood Products owned and operated by F & H Store Fixture Limited, (Respondent). (*Granted*).

3334-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Astro Concrete & Servicing London Limited, (Respondent). (*Withdrawn*).

3370-84-M: The United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. Ambico Sales Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION

2310-83-U: John Glykis, (Complainant) v. Hotel Employees Restaurant Employees Union, Local 75 and The Four Seasons Hotels Limited (Inn on the Park), (Respondents). (*Denied*).

3129-83-R: Paul Neeson, (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Toronto and Vicinity, (Respondent). (*Denied*).

1259-84-R: Local #1 Ontario – International Union of Bricklayers' & Allied Craftsmen, (Applicant) v. Quorum Inc., (Respondent). (*Denied*).

2360-84-U: Michael Baranowski, (Complainant) v. Teamsters Union Local 938, (Respondent). (*Denied*).

2530-84-R: Toronto Auto Parks (Airport) Limited, (Applicant) v. Canadian Union of Public Employees, (Respondent). (*Denied*).

CROWN TRANSFER ACT

2953-84-R: The Regional Municipality of Waterloo, (Applicant) v. The Ontario Public Service Employees Union, (Respondent) v. Canadian Union of Public Employees, Local 1883, (Intervener). (*Withdrawn*).

*Ontario Labour Relations Board,
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M7A 1V4*

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ONTARIO LABOUR RELATIONS BOARD REPORTS

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: NIMAL V. DISSANAYAKE

Selected decisions of particular reference value are
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NOTICE

PRE-HEARING CONFERENCE PROCEDURE

1. *Beginning on October 1, 1985*, in proceedings where it is deemed appropriate, the Ontario Labour Relations Board will convene a pre-hearing conference in applications for successor employer declarations under Section 63 of the *Labour Relations Act* and for related employer declarations under sub-section 1(4) of the Act.

2. The pre-hearing conference procedure is intended to allow the parties to an application to identify the factual and legal issues in dispute and assist them to resolve or narrow those issues. The Board will normally convene the pre-hearing conference before a Vice-Chairman of the Board prior to the date scheduled for hearing the application on its merits. The Registrar will notify the parties of the date for the pre-hearing conference.

3. Attendance at the pre-hearing conference will be expected of counsel or agent for each party, or where a party is unrepresented, by the individual party. Counsel, or a party where said party is unrepresented, will be expected to identify the issues in dispute, agree to facts or other matters not in dispute, identify the number of witnesses they propose to call, the number of days required for the hearing, and the material facts upon which they intend to rely.

4. The Vice-Chairman conducting the conference will not be a member of the panel hearing the complaint on its merits. The Vice-Chairman will record in a memorandum all agreements reached by the parties and issues identified as being in dispute, with a copy of the memorandum to be given to each party who attends at the pre-hearing conference.

5. Communications or statements made during the pre-hearing conference, except as disclosed in the memorandum, are confidential and shall not be disclosed to the panel presiding at the hearing.

NOTICE

SERVICE REQUIREMENTS

PRACTICE NOTE NO. 5, SERVICE OF DOCUMENTS AND NOTIFICATION OF PROCEEDINGS BY THE BOARD has been amended by adding the following paragraphs immediately after paragraph 4:

5. Notwithstanding paragraphs 1 to 4, unless the Board otherwise specifically directs, after the first scheduled hearing date in the proceeding it is the responsibility of a party or participant who files any document or correspondence with the Board to serve a copy of the document or correspondence on all those entitled to notice. Any such document or correspondence so filed with the Board must be accompanied by a statement that the party filing it has effected the service required by this paragraph.

6. The service requirements contained in paragraph 5 above shall not apply where the document or correspondence discloses whether a person is or is not a member of a trade union or does not desire to be represented by a trade union.

7. Should any dispute arise over service of documents or correspondence referred to in paragraph 5, the onus of proving service shall lie upon the party or participant seeking to rely on the said document or correspondence.

8. If documents or correspondence are not served as required herein, the Board may refuse to consider such documents or correspondence, or may consider them on such terms or conditions as it deems appropriate.

This amendment will become effective on November 1, 1985.

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Ontario
Labour Relations
Board

Commission
des relations
de travail de l'Ontario

Our File Number/Notre dossier n°

NOTICE

PRE-HEARING CONFERENCE PROCEDURE

1. Beginning on October 1, 1985, in proceedings where it is deemed appropriate, the Ontario Labour Relations Board will convene a pre-hearing conference in applications for successor employer declarations under Section 63 of the Labour Relations Act and for related employer declarations under sub-section 1(4) of the Act.

2. The pre-hearing conference procedure is intended to allow the parties to an application to identify the factual and legal issues in dispute and assist them



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Ontario
Labour Relations
Board

Commission
des relations
de travail de l'Ontario



Our File Number/Notre dossier n°

400 University Avenue
Toronto, Ontario
M7A 1V4
416/965-4151

NOTICE

SERVICE REQUIREMENTS

PRACTICE NOTE NO. 5, SERVICE OF DOCUMENTS AND NOTIFICATION OF PROCEEDINGS BY THE BOARD has been amended by adding the following paragraphs immediately after paragraph 4:

5. Notwithstanding paragraphs 1 to 4, unless the Board otherwise specifically directs, after the first scheduled hearing date in the proceeding it is the responsibility of a party or participant who files any document or correspondence with the Board to



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7. Should any dispute arise over service of documents or correspondence referred to in paragraph 5, the onus of proving service shall lie upon the party or participant seeking to rely on the said document or correspondence.

8. If documents or correspondence are not served as required herein, the Board may refuse to consider such documents or correspondence, or may consider them on such terms or conditions as it deems appropriate.

This amendment will become effective on November 1, 1985.

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of counsel or agent for each party, or where a party is unrepresented, by the individual party. Counsel, or a party where said party is unrepresented, will be expected to identify the issues in dispute, agree to facts or other matters not in dispute, identify the number of witnesses they propose to call, the number of days required for the hearing, and the material facts upon which they intend to rely.

4. The Vice-Chairman conducting the conference will not be a member of the panel hearing the complaint on its merits. The Vice-Chairman will record in a memorandum all agreements reached by the parties and issues identified as being in dispute, with a copy of the memorandum to be given to each party who attends at the pre-hearing conference.

5. Communications or statements made during the pre-hearing conference, except as disclosed in the memorandum, are confidential and shall not be disclosed to the panel presiding at the hearing.

2282-84-R Canadian Union of Public Employees, Applicant, v. **Bethesda Service Employees Association**, Respondent, v. Bethesda Home for the Mentally Handicapped Inc., Intervener, v. Group of Employees, Objectors

Union Successor Rights – Motion to merge union narrowly passed by membership – Group of employees claiming subsequent change of heart – Whether declaration of successorship refused – Whether causing Board to direct vote in circumstances

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *W. H. Wightman* and *W. F. Rutherford*.

APPEARANCES: *Helen O'Regan*, *George Wilson*, *Vern G. Dell*, *Tim Tobson* and *Roman Rozborowskyj* for the applicant; no one for the respondent; *Mark Contini* for the intervener; *H. Blokezy* and *Ken Janzen* for the objectors.

DECISION OF THE BOARD; May 28, 1985

1. This is an application under section 62 of the *Labour Relations Act*. The applicant, Canadian Union of Public Employees ("CUPE), claims that it has acquired the rights, privileges and duties of its predecessor, the Bethesda Service Employees Association (the Association), by reason of a merger, amalgamation or a transfer of jurisdiction. The intervener employer takes no position on this issue. It describes its position as neutral and does not now contest the facts set out by the applicant in support of its application, nor does it question the regularity or propriety of the steps taken by the two union entities to effect a merger. The intervener employer is content to have this matter determined on the basis of the material before the Board without the necessity of a formal hearing.

2. However, certain employees have written to the Board respecting this matter. In particular, Ms. A. M. Clark wrote a letter signed by some forty-four other individuals. She indicates that *subsequent to the vote*, which was narrowly in favour of a merger with CUPE, certain employees may have had a change of heart because they became aware of other unions which might be interested in representing the employees and which the executive of the Association had not explored or raised at the meeting scheduled to consider merging with CUPE. For the Association, it was asserted that no such concern was raised at the merger meeting, or at any other time prior thereto. In its submission, there was ample notice given to the employees potentially affected – not least because the employer actively campaigned against the merger and gave opponents two hours off work to attend the meeting.

3. A hearing was held, in Toronto, on March 4, 1985. The applicant, respondent, and intervener all appeared. No one appeared on behalf of the objecting employees. It was the applicant's information (albeit secondhand) that Ms. Clark did not intend to appear; however, it was impossible for the Board to determine whether this was so, or whether she had simply been dissuaded because of inclement weather. Accordingly, the Board determined that it was unwise to proceed on that day. Instead, the Board scheduled a new date for hearing.

4. The matter came on for hearing again on May 13, 1985. As before, the applicant, respondent, and intervener all appeared, and Ms. Clark did not. However, two other employees did. These two individuals had signed Ms. Clark's letter, but were unaware of the circumstances in which the other signatures were solicited or the precise views of those employees. The two employees made it clear that they represented only themselves and not the other individuals in the group.

5. Mr. Blokezyl submitted that his fellow employees may not have fully realized the implication of the merger with CUPE and should be given another opportunity to take a second look at the situation. He points out that, while he has always opposed the merger and voted against it, some of the other employees who voted in favour may now be having second thoughts. He does not challenge the constitutionality of the steps taken to effect the merger, or the adequacy of the notice to employees of the membership meetings. Nor does he contest that all employees who wished to do so had an opportunity to attend and participate. Indeed, of a total of approximately 83 employees potentially eligible to vote, 73 employees attended the meeting and cast their ballots. This participation rate (88%) is much higher than in most federal or provincial elections.

6. Mr. Blokezyl was also concerned about the effect of the merger with CUPE and the Board's successor rights determination. But it appears that these concerns result, at least in part, from a misunderstanding. For the short run at least, the executive of the Association will remain in place. The collective agreement also remains in place until its expiry date in March, 1986, at which time a local bargaining committee, with the legal and economic assistance of CUPE, will meet with the employer for the purpose of concluding a new agreement. Mr. Blokezyl was concerned about the possibility of a strike, but under the CUPE constitution, that remains a matter for the local employees themselves to determine. Ironically, it appears that, under the CUPE constitution, it requires a *larger* employee majority to authorize a strike than would be necessary under the auspices of the Association. In any event, we do not think these concerns are sufficient to warrant the refusal of a declaration under section 62 of the Act, or to warrant the exercise of the Board's discretion to direct the taking of a vote pursuant to section 62(2) of the Act. The Board notes that in the last two months of the current collective agreement, the employees will be entitled to seek to displace their existing bargaining agent and replace it with another union or no union at all, if that is their wish.

7. On the basis of the totality of the material before the Board, the Board declares that the applicant, the Canadian Union of Public Employees, has acquired the rights, privileges and duties under the Act of its predecessor, the Bethesda Service Employees Association, by reason of a merger, amalgamation or transfer of jurisdiction.

3479-84-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Applicant, v. Center Tool & Mold Company Limited, Respondent

Certification – Trade Union – Trade Union Status – Evidence that written constitution initially adopted – Document not in existence for years and no evidence as to all its contents – Organization administered on basis of oral rules – Whether viable structure existing to constitute organization of employees – Incumbent not a trade union – Applicant certified without vote

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *J. Murray* and *L. Collins*.

APPEARANCES: *Ms. Lorna J. Moses, Joseph Sullivan and Kenneth Simpson* for the applicant; *E. L. Stringer, Q.C., C. Sutts, Q.C., and A. Toldo* for the respondent.

DECISION OF THE BOARD; May 24, 1985

1. This application for certification was filed on March 27, 1985. In its Reply, the respondent employer asserted that the Center Tool Employees Organization was a trade union known to the respondent as claiming to be bargaining agent of employees affected by the application. The respondent further claimed to be party to a collective agreement with the Center Tool Employees Organization. By its terms, the alleged collective agreement expires May 15, 1985. There is, accordingly, no question of the timeliness of this application.

2. Notice of this application was given to the Center Tool Employees Organization. It has not sought to intervene in this application.

3. This application came before a differently constituted panel of the Board on April 19, 1985. The results of that hearing are reflected in a decision dated April 23, 1985, in which that panel noted:

1. Prior to the scheduled hearing in this matter, the parties met with a Labour Relations Officer and reviewed all of the issues in this application for certification. The only issue remaining in dispute was whether the Board should direct a representation vote by reason of the alleged existence of a collective agreement between the Center Tool Employees Organization and the respondent.

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5. Counsel for the respondent requested an adjournment for one week in order to have the opportunity to call evidence to establish that the Center Tool Employees Organization is a trade union within the meaning of the *Labour Relations Act* and the agreement between it and the respondent is a collective agreement within the meaning of the Act. The applicant agreed to the respondent's request. Counsel for the respondent acknowledged that the burden of proving the existence of a collective agreement within the meaning of the *Labour Relations Act* rested on the respondent.

That panel also dealt with matters the parties had resolved, including the definition of the appropriate bargaining unit. The applicant had proposed that the unit consist of all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff. Having regard to the statutory exclusion of plant guards, the applicant's proposed unit was essentially co-extensive with the bargaining unit described in the

recognition clause of the document alleged by the respondent to be a collective agreement. Although it was taking the position that this should be treated as a displacement application, the respondent also took the position that the appropriate bargaining unit should be defined so as to exclude engineering and design staff, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. The applicant agreed to the bargaining unit proposed by the respondent, and the Board found that unit appropriate for collective bargaining in its decision of April 23, 1985. The Board also found that more than fifty-five per cent of the employees in that bargaining unit on the date of the application were members of the applicant on the terminal date. Indeed, on the basis of the membership evidence filed and the list of employees settled by the applicant and respondent in their meeting with the Labour Relations Officer, it is apparent that more than two-thirds of the employees in the agreed upon bargaining unit were members of the applicant at the relevant time.

4. The issue defined in paragraphs 1 and 5 of the decision of April 23, 1985, came before this panel on April 26, 1985. At the beginning of our hearing we enquired whether anyone was present representing the Center Tool Employees Organization. One member of the audience said he and the two persons with him were the current members of the committee. He said they did not wish to take any active part in the hearing, and were only there so that they could report back to the employees who were opposed to the union.

5. The respondent called two witnesses. The first was Mario Taiariol, the principal of a company unrelated to the respondent. He had been employed by the respondent from 1957 to 1981. He identified a printed agreement dated April 23, 1971 between the respondent and the Center Tool Employees Organization, covering the period April 5, 1971 to April 5, 1974. He acknowledged that he was one of the three persons who signed that agreement on behalf of the employees' organization. He explained that the employees' organization had been brought into existence in early 1971 following an earlier unsuccessful attempt by this applicant to organize the employees of the respondent. He said that forty or fifty of the respondent's employees attended a meeting and elected a committee of three to represent them. Mr. Taiariol was one of the three elected, along with Peter Dziver and a Mr. Lavoie. As Lavoie received the most votes, he became Chairman. Mr. Taiariol recalls that a constitution prepared by Mr. Lavoie was discussed and approved at this meeting. Mr. Taiariol remembers seeing this document, but could remember only some of its provisions. He recalled that it provided for the committee of three and set out the limitations on its powers; the committee had to have membership approval of any decision. He believes the documents specified the majority needed for ratification of a contract. The document expressly provided that dues were *not* to be paid. He thinks there was some provision for dissolving the organization. After these rules were adopted, the committee began negotiating with the company for a first agreement. Mr. Lavoie resigned from the committee a month before the agreement was obtained. Because he had received the second highest number of votes at the original meeting, Mr. Taiariol became Chairman. Because he had had the fourth highest number of votes at the original meeting, Victor Sartori filled the vacancy created by the departure of Mr. Lavoie. Mr. Taiariol described the negotiation process which led to the agreement of April 23, 1971, which he and Messrs. Dziver and Sartori signed on behalf of the employees' organization. On the basis of his testimony and the contemporaneous documentation Mr. Taiariol identified, we are satisfied that the applicant's sole witness, Mr. Sullivan, is mistaken in his recollection that the agreement dated April 23, 1971 was first put forward at a meeting called by management on April 5, 1971 and signed on that date by volunteers who only later came to be regarded as the

committee. We are satisfied that the committee existed and engaged in negotiations with management prior to April 5, 1971, and that the meeting on that date was called so that the employees could consider the last offer of their employer.

6. Mr. Taiariol resigned from the committee at some time in 1971, after the first agreement was obtained. He remained a bargaining unit employee until 1974, when he became the respondent's plant manager. He had no idea where the constitutional document drawn up by Mr. Lavoie might now be, and acknowledged that membership cards were not drawn up or discussed at the time the constitution was formed.

7. The respondent's other witness was Henry Moro. He is presently employed by the respondent as Supervisor of Mold Design and Engineering, a position he has occupied since December, 1980. He was a full-time bargaining unit employee from February, 1974, to the time of his promotion to management. Mr. Moro testified that he and four others were nominated for the committee at a nomination meeting in January, 1977. Employees cast ballots in an election the next day. He received the most votes, and therefore served as Chairman of the committee from January 1977 to late March, 1980. He and his two colleagues on the committee negotiated a collective agreement covering the three-year period starting March, 1977. That agreement was ratified in a secret ballot vote of employees. Mr. Moro explained that the agreement ultimately ratified by the employees was the second proposal the committee took to them; the first tentative agreement had been rejected in a similar secret-ballot vote. Mr. Moro and the other two members of the committee remained active until March, 1980, when another committee was elected by secret ballot vote, following a nomination meeting of the sort at which Mr. Moro had been nominated in 1977. Moro explained that if employees had problems during the term of the agreement his committee had negotiated with the respondent, they would bring the problems to the committee. If the committee members thought a complaint was valid, they would take it to management for the employee as they employees' representative.

8. During the time he held office, Mr. Moro never saw any written constitution for the organization. Asked whether he had ever heard anyone talk about a constitution, Mr. Moro said we had by-laws and patterns of operation, yes. He acknowledged he had never seen these by-laws in writing, and that the procedures were passed on from committee to committee by word of mouth. The procedures he had in mind covered the conduct of nomination meetings and elections by secret ballot, prescribed the manner in which motions were to be dealt with at meetings and stipulated that the committee would stay on as representatives of the employees after it had negotiated a collective agreement with management.

9. The only qualification for membership of which Mr. Moro was aware was that employees had to be employed for thirty days in order to be covered by the benefit package. He said that after that thirty day period, you were being represented. Asked whether an employee had to do anything to become a member, Mr. Moro said that after being employed for thirty days an employee would be approached and told that he was a member. During Mr. Moro's term on the committee there was never any need to collect monies from members for any purpose, and there was no discussion about printing or using membership cards. Members would learn of the rules of the organization by attending the first contract meeting, at which the procedures described by Mr. Moro would be discussed.

10. Counsel for the respondent began his argument with a reference to paragraph 11 of the Board's decision in *The Parkdale Wines Limited*, [1970] OLRB Rep. July 485:

11. When the Board is faced with the situation where a party upholds a document which it alleges to be a collective agreement and asserts that the collective agreement is a bar to an application for certification and if the document is challenged, the Board is faced with two issues. The Board must be satisfied that the document is a collective agreement within the meaning of section 1(1)(c) of the Act. As stated in the cases cited above, the Board must first be satisfied that the party to the collective agreement which represents the employees of the employer is a viable entity. *The fact that the organization is a viable entity may be established by filing a constitution which would be documentary evidence of its existence and by identifying the officers or officials of the organization through whom the organization acts.* Once it has been established that the organization is a viable entity and has been party to the agreement for more than one year, the Board assumes that the entity is a trade union within the meaning of the Act. The party upholding the agreement had the onus of establishing that the organization which represents the employees is a viable entity and the onus of calling evidence to establish this fact rests upon such party (see *The Peterborough County Board of Education Case*).

[emphasis added]

Counsel focused on the emphasized sentence, and relied on the Board's use of the word may to support his submission that the failure to file a constitution for the Center Tool Employees Organization was not fatal to the respondent's position. He cited the Board's decision in *Beach Industries Limited*, [1965] OLRB Rep. Dec. 633 in further support of that submission, and also for the proposition that in these circumstances a respondent employer will have discharged the onus on it if it proves that the entity with which it has bargained collectively for a number of years did have a constitution at the time it was first granted voluntary recognition by the respondent. The Board's decision in *National-Standard Company of Canada, Limited*, [1974] OLRB Rep. Oct. 704 was also said to support the latter submission. Counsel argued that the evidence of Mr. Taiariol established the Center Tool Employees Organization had a constitution when it was formed in 1971, and that the reference to a constitution in its first collective agreement with the respondent in 1971 was further evidence that the organization had a constitution at that time. Anticipating the applicant's argument that the organization had never used membership cards, counsel submitted that we should find on the evidence that every employee passed his or her probationary period was regarded as a member and that every such person was, in fact, a member of the organization.

11. The applicant's representative cited *Alcan Universal Homes, Division of Alcan Design Homes Limited*, [1969] OLRB Rep. Apr. 55, *Elgin County Roman Catholic Separate School Board*, [1970] OLRB Rep. Feb. 1352, *Canteen of Canada Limited*, [1978] OLRB Rep. Sept. 802 and *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB Rep. June 498 as requiring that an organization have a constitution before it can be considered to be a trade union. She emphasized that the document said to be the constitution of the Center Tool Employees Organization had not been produced, that officers of the organization could only now have it by word of mouth that there had been such a document, and that there was no evidence that anyone currently involved in the organization had ever read the document in question. She noted that the first agreement with the organization had come on the heels of an unsuccessful organizing campaign by the U.A.W., and suggested that the organization had been hurriedly put into place. She submitted the Board should find on the evidence that the Center Tool Employees Organization is not a viable entity and that the applicant should be certified without a vote on the basis of its demonstrated membership support.

12. By way of reply, counsel argued that the cases cited by the union's representative did not support the proposition that a written constitution must not only exist but also be seen or read. He submitted the evidence demonstrated that the organization's membership has acted pursuant to an understanding of the terms of the constitution, and that this was demonstrated by a consistent pattern of conduct since 1971 in the nomination and election of committee members and the secret ballot procedure by which collective agreements had been ratified.

13. Before analysing the evidence and argument and the Board's jurisprudence with respect to the nature of an inquiry into trade union status of an alleged incumbent bargaining agent, it will be useful first to consider briefly the purpose of the inquiry in this case. The Center Tool Employees Organization has not applied to the Board for certification or, for that matter, for anything else. The Board has not been called upon to determine whether the Center Tool Employees Organization has breached or is capable of breaching any of these provisions of the *Labour Relations Act* which impose obligations on trade unions. The status of the employees' organization is not in any way relevant to our jurisdiction to entertain this certification application; this application is a timely one whether the respondent's agreement with the employees' organization is a collective agreement or not. Because of the degree of employee membership in the applicant at the relevant time, we have the discretion under section 7 of the Act to either certify the applicant outright or to direct a representation vote. The inquiry on which the Board has embarked at the invitation of the respondent is directed solely to the exercise of that discretion.

14. When the effect of granting a certification application would be to displace the existing bargaining rights of an incumbent trade union, it is the longstanding policy of this Board not to grant certification except following a representation vote in which employees are offered a choice between the applicant and incumbent. This practice, and the reason for it, were described in *Canadian John Wood Manufacturing Co., Ltd.*, 46 CLLC, 16,449:

... There has been no intervention in the present proceedings. Had the United Steelworkers of America, Local 3062, intervened in these proceedings, we should have followed our usual practice in such cases, a practice sanctioned by the decision of the National Board in the *New York Central* case, [Dominion 10,436], and directed a vote in which the name of the petitioner as well as that of the aforementioned trade union would both have appeared on the ballot, so as to enable the employee to indicate their preference. In our opinion, the employees should be afforded such a choice in this instance despite the fact that the United Steelworkers of America, Local 3062, has not intervened in these proceedings. Such a course would carry out the thought which motivated the National Board in the *New York Central* case, *supra*, namely that an organization which holds a collective agreement should not be displaced unless the employees are given an opportunity to mark their ballots in its favour.

Our conclusion in this respect is also in line with our decisions in the *Beach Foundary* case [16,443], the *Purity Bread* case, [16,447] and the *Toronto Transportation Commission* case, [16,448]. The underlying principle in all of these cases is that stability in collective bargaining relations should be promoted to the fullest extent that the law will permit. This case must be distinguished from those cases in which a trade union or employees' organization party to such agreement, having lost interest in the employees, makes no effort to renew the agreement. It must also be distinguished from those cases in which a trade union or employees' organization party to an agreement has been dissolved or has disintegrated and has thus ceased to exist. *Breihaupt Leather* case, [16,446]. In those instances, we would not be inclined to include the name of such an organization on the ballot unless it actually intervened in the proceedings. Here, the trade union which was a party to the agreement was still a living force and still retained its interest in the collective agreement when the application of the present petitioner was filed.

See also, *Thomas Fuller Construction Company (1958) Limited*, [1963] OLRB Rep. May 108; *Redfern Construction Company Limited*, [1967] OLRB Rep. Sept. 606; *Nadeco Limited*, [1970] OLRB Rep. Apr. 141. As the Board noted in *Canadian John Wood Manufacturing Co., Ltd.*, *supra*, this practice is followed even where the incumbent trade union does not intervene in the certification application: see also *NCR Canada Ltd.*, [1974] OLRB Rep. Dec. 847. This practice is only applied, however, when where it is acknowledged or found that the incumbent bargaining representative is, indeed, a trade union. The fact that employees have regularly been represented in joint bargaining by a representative other than a trade union – a shop committee, for example – has not led the Board to direct a representation vote when the applicant trade union demonstrated employee support sufficient for outright certification: *Hall Engineering (Ontario) Limited*, [1981] OLRB Rep. Oct. 1406. Consistent application of this policy would require that we direct a representation vote offering a choice of continued representation by Center Tool Employees Organization only if we are satisfied that that organization is a trade union which had bargaining rights for employees affected by this application at the time it was filed. The applicant has agreed that the current agreement between the respondent and the employees' organization must be a collective agreement if the organization is a trade union, and it follows from that that the organization would have current bargaining rights if it were a trade union.

15. Accordingly, the issue joined by the applicant and respondent is whether the Center Tool Employees Organization is a trade union. That organization has not intervened. There are, as we have noted, cases in which a vote has been ordered and the incumbent's name placed on the ballot notwithstanding that the incumbent has not intervened. There was no question in any of those cases that the incumbent was anything other than a trade union. Reported decisions in which such a question has arisen in relation to the exercise of the Board's discretion to direct a two-way vote involve cases in which the incumbent has intervened in the proceedings: see, for example, *The Ottawa Citizen*, [1969] OLRB Rep. Mar. 1268; and, *The Peterborough County Board of Education*, [1969] OLRB Rep. Aug. 636. There are cases in which respondent employers have asserted the trade union status of non-intervening incumbents, when that was part of the proof necessary to establish a collective agreement bar to an application for certification. The parties did not cite, and we are not aware of, any reported decision in which a respondent employer has asserted the trade union status of an entity not party to the proceedings when that status is challenged and would be relevant only to the Board's exercise of its discretion to order a representation vote. The applicant did not challenge the respondent's right to pursue that issue in this case.

16. In section 1(1)(p) of the *Labour Relations Act*, trade union is defined as an organization of employees formed for purposes that include the regulation of relations between employees and employers In determining whether an entity or group of persons constitutes a trade union, the Board is obliged not to impose requirements unsupported by the language of section 1(1)(p) in the context of the *Labour Relations Act*: re *CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (Ont. C.A.); and see, *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279 at paragraphs 38 to 61. The definition requires that there be an organization. The precise nature of that organization is not defined, but certain necessary characteristics can be inferred from the modifying phrase of employees and from the nature of the rights, obligations and duties conferred and imposed on trade unions by the *Labour Relations Act*. In *Associated Hebrew Schools of Toronto*, [1978] OLRB Sept. 797, the Board commented on the formality of structure required in order to constitute a organization of employees:

9. Section 1(1)(n) of *The Labour Relations Act* defines a trade union, in part, as an organization of employees formed for purposes that include the regulation of relations between employees and employers. . . . Such an organization is entitled, if it otherwise qualifies, to be certified, to negotiate collective agreements and generally to exercise the rights of a trade union under the Act. The Board, in seeking to determine whether an applicant before it is a trade union, required that it be more than just an informal joining together or individuals. Instead, the Board requires that the applicant be a formal organization whose members have bound themselves together on the basis of specific terms for purposes that include the regulation of relations between employees and employers. The decision of the Supreme Court of Canada in *Orchard v. Tunny* (1957) 8 D.L.R. (2d) 273 and the Ontario Court of Appeal in *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 indicate that the essence of a trade union is a group of individuals who have entered into a contractual relationship one with the other, the terms and conditions of which are provided by the union's constitution. In *Orchard v. Tunny*, Rand J. in delivering the majority decision of the Court stated at p. 281:

Apart, then, from statute, that a union is held together by contractual bonds seems obvious, each member commits himself to a group on a foundation of specific terms governing individual and collective action . . . and made on both sides with the intent that their rules shall bind them in their relations to each other. That means that each is bound to all the others jointly

In *Astgen v. Smith*, Mr. Justice Evans in giving the majority decision of the Court made the following statements concerning the International Union of Mine, Mill and Smelter Workers at p. 662:

Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelt out in the memorandum of association usually referred to as the 'constitution'. the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill.

I adopt also the proposition stated by Thomson J. in *Bimson v. Johnson et al* [1957] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p.22, which was affirmed on appeal [1968] O.W.N. 217, 12 D.L.R. (2d) 379: ' . . . that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws. . . . The contract is not a contract with the union or association as such, which is devoid of power to contract, but rather the contractual rights of a member are with all other members thereof'.

10. Once a trade union has come into existence it is a relatively simply matter for others to become members of the organization and thereby enter into a contractual relationship with the existing members. When a new member joins, however, he does so on the basis of a pre-existing constitution. He knows (or at least should know) that it is a trade union which he is joining, that he is entering into a contractual relationship with the other members of the union and that the terms of that relationship are as spelt out in the union's constitution. The more difficult procedure to accomplish is for a group of employees to create a trade union where none has existed before. This process must involve not only the settlement of the terms of a constitution for the union, but also the taking of steps which make it clear that the individuals involved have actually entered into a contractual relationship one with another on the basis of the terms set forth in the constitution.

11. The Board has in a number of cases indicated a series of steps which will generally be sufficient to insure that a trade union has been brought into existence. See, for example, *Local 199 U.A.W. Building Corporation* [1977] OLRB Rep. July 471.

These steps may be summarized as follows:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meeting.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.
3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.
4. The constitution should be ratified by a vote of the members.
5. Officers should be elected pursuant to the constitution.

The steps outlined in paragraph 11 of the decision in *Associated Hebrew Schools of Toronto* do not represent the only procedure by which a group of employees can create the structure envisaged by the earlier-quoted Court decisions. The Board has recognized that the web of contractual relationships described in those decisions can arise in more than one manner: *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. It is, however, of fundamental importance that a contractual relationship be created and maintained. The maintenance of the organization's formal structure requires, as paragraph 10 of the decision in *Associated Hebrew Schools of Toronto* indicates, that new members become party to the contractual relationship by agreeing to its terms, and that can only occur if the terms of that relationship are clear and capable of being ascertained by current and proposed members. The collection of rules of the contractual relationship is usually called the constitution or by-laws of the organization. It is normally supposed that such rules will be reduced to writing. Indeed, section 84 of the *Labour Relations Act* provides:

84. The Board may direct a trade union, council of trade unions or employers' organization to file with the Board within the time prescribed in the direction a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.

Implicit in this provision is the expectation not only that a trade union will have a constitution or by-laws or both, but also that the constitution and by-laws, if any, will be in writing.

17. The evidence before us is that in 1971 a group of employees agreed to a set of rules by which a negotiating committee would be elected and function on their behalf in negotiations with their employer. It is said that a written constitution was approved. That document is not before us. The only witness who ever saw it is unable to remember all of its terms. The terms he did remember did not address the means by which employees were to obtain membership in the organization or the obligations employees would assume upon becoming members. Whatever may have been the basis on which the Center Tool Employees Organization and its bargaining committee functioned in 1971, it is clear from Mr. Moro's evidence that the committee and organization functioned from 1977 to 1980 in accordance with oral rules handed down from the previous committee, and not in accordance with the terms of any written constitution. It is impossible for us to say whether the oral rules transmitted to Mr. Moro's committee are the same as or different from the rules set out in the written constitution Mr. Taiariol said he saw in 1971. As is the case with the constitutional terms remembered by Mr. Taiariol, the rules passed on to Mr. Moro did not define any membership

obligations or speak to any formal process by which employees would obtain membership and so undertake the obligations of members.

18. The issue before us is whether there is *now* an organization named Center Tool Employees Organization which can be described as a trade union within the meaning of the *Labour Relations Act*. The respondent's evidence dealt with the history of an organization by that name up to March of 1980. By that time, the organization, if it could be described as one, was functioning on the basis of rules which had devolved, and perhaps evolved, orally; it was not functioning on the basis of the written constitution seen Mr. Taiariol in 1971, or any other written constitution for that matter. We have no evidence of the basis on which the alleged organization functioned after March of 1980, and if we are to draw any inference from the evidence we have heard, it is that the 1971 constitution no more formed the foundation of the organization in 1985 than it did in 1980.

19. Though section 84 of the *Labour Relations Act* contemplates that the trade union's constitution will be in writing, it might be argued that the contractual formalities among members necessary to create and maintain a trade union need not be reduced to writing; at common law, perfectly enforceable contracts can be created orally. Assuming, without deciding, that it is theoretically possible for a trade union to be constituted and operate on the basis of an oral constitution, there are some obvious practical difficulties involved in the attempt to do so. One is the sheer unlikelihood that anyone could remember the details of even the simplest union constitution without the assistance of written memoranda. The difficulty multiplies with the number of people who would have to maintain a common recollection of the rules to which they had subscribed at various times in the organization's history. Perhaps the exercise would not be a practical impossibility. Without proof of the current existence and accessibility of a written document or some other universally accepted authoritative source to serve as an anchor for drifting and failing memories, however, we would certainly require some affirmative proof that the *current* members of the organization share a common understanding as to the rules by which members of the organization are now governed before we would conclude that a viable entity was functioning and capable of functioning on the basis of an oral constitution. There is no such evidence before us.

20. Evidence that an organization once adopted a written constitution is some evidence that the organization was then a trade union but, like a past Board finding to that effect, it raises only a rebuttable inference that the organization has remained a trade union. The totality of the evidence may show that an organization has dissipated or abandon its constitution, or simply ceased to have any awareness of or to be governed by whatever constitution may have lead to an original finding that it was a trade union: *Allbright Platers Limited*, [1972] OLRB Rep. Aug. 784; *Tridon Limited*, [1974] OLRB Rep. Jan. 16; *Footwear Fashions Limited*, [1981] OLRB Rep. Apr. 454.

21. Even if we could assume, as we cannot, that the organization is now governed by a set of rules similar to those contained in the written constitution of 1971, or to the oral rules passed on to Mr. Moro in 1977, we would have difficulty concluding that those rules had created an organization capable of being described as a trade union. The difficulty with those rules is that they are insufficiently formal on the question of membership. The following words of the Board in *Tridon Limited* bear application to the evidence we heard with respect to the functioning of the organization in 1971 and in the period 1977 to 1980:

12. A superficial glance at the situation reveals what appears to be a superstructure of officers who carry out functions normally performed by officers of a trade union. It is, however, the question of the existence of a proper substratum that causes difficulty in finding a ready answer to the question before the Board. That is whether there can be said to be an organization in the absence of formal membership requirements and formal mutual obligations between the employees concerned because of which they may be identifiable as members of an organization.

13. In the case of *Orchard et al. v. Tunney*, 8 D.L.R. (2D) (1957) 273 at pp. 281 and 282, the Court, in dealing with the nature of a union, stated: . . . Apart, then, from statute that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations; that the body as such is that to which the responsibilities for action taken as of the group are to be related.

14. Evans, J.A., in the course of his majority judgment in the Ontario Court of Appeal in *Astgen et al. v. Smith et al.*, 7 D.L.R. (3D) 1970, 657 at p. 661, in dealing with the question of the legal status of a trade union stated: . . . I concede at the outset that a labour union under the Labour Relations Act, R.S.O. 1960, c. 202, and allied legislation has a 'status' conferred by such legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relation to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.

15. In the present case, there are no contractual bonds or commitments made by the employees to each other and the group. There are no obligations imposed or accepted indicative or membership in a group. There are no fees, dues or other monetary requirements paid or payable by employees which might serve to identify them as members of an organization. Finally, the word organization implies the regulation of conduct between members by means of a constitution, by-laws or rules and regulations to which those proposing to be members may subscribe. There has been no such subscription in this case and there are, in fact, no members in the sense contemplated by the foregoing cases. . . . It follows, therefore, that the intervener is not an organization and therefore cannot be a trade union within the meaning of the Labour Relations Act.

16. The fact is that the employees at large of the respondent are simply an unrestricted electorate whose only qualification to vote is that they be employees other than foremen or office staff. They have, from time to time, elected fellow employees to act as spokesmen with management. The use of such titles as president and secretary and departmental representatives in itself does not, of course, create an organization capable of being found to be a trade union within the meaning of the Act, particularly the absence of mutually obligated members.

See also, *The Dufferin-Peel Roman Catholic Separate School Board*, [1976] OLRB Rep. Dec. 821; *Donna Hewett*, [1977] OLRB Rep. Mar. 159 and *Durham Metal Stamping & Assemblies*, [1978] OLRB Rep. Dec. 1092.

22. We have given no weight to the applicant's assertion that attempts to create a Center Tool Employees Organization took place hurriedly after its earlier unsuccessful organizing campaign. The applicant has made no allegation of employer interference or support. We do not for a moment question the *bona fides* of the persons who have served on these committees

from time to time. We have no reason to suppose that they functioned otherwise than at arm's length from management during the time they acted on behalf of their fellow employees. We are simply unable to conclude, on the evidence before us, that the Center Tool Employees Organization today possesses a structure sufficiently formal for it to be described as an organization of employees within the meaning of the *Labour Relations Act*.

23. The applicant had the support of approximately two-thirds of the bargaining unit employees at the relevant time. For the foregoing reasons, we have concluded that it is neither necessary nor desirable for the Board to exercise its discretion to direct that a representation vote be taken in the circumstances of this case.

24. A certificate will issue to the applicant with respect to the bargaining unit described in paragraph 3 of the Board's decision herein dated April 23, 1985.

1446-84-R International Union of Operating Engineers, Local 793, Applicant, v. Colautti Construction Ltd., Respondent, v. Employees Association of Colautti Construction Ltd., Intervener

Certification – Petition – Practice and Procedure – Membership Evidence – Receipts filed not accompanied by applications for union membership – Oral evidence not permitted to establish applications for membership made – Prior certification application withdrawn in middle of inquiry into petition – Petition in prior application nor circumstances of withdrawal causing Board to refuse to entertain second application

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

APPEARANCES: *B. Fishbein* and *E. A. Ford* for the applicant; *Raymond G. Colautti* and *Ronald A. Colautti* for the respondent; *Jacques A. Emond* and *Steve Clarmo* for the intervener.

DECISION OF THE BOARD; May 14, 1985

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and, for the same reasons as are set forth

in the Board's decision in *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729, is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency, on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The applicant has applied for certification with respect to a bargaining unit comprised of operators and maintainers of construction equipment employed by the respondent in the industrial, commercial and institutional (ICI) sector of the construction industry in the whole of the Province of Ontario and in all other sectors in a geographic area known as Board Area #15. The applicant had previously filed an application for certification respecting the respondent's employees in a bargaining unit described in the same terms as in the instant application. A group of employees who were opposed to being represented by the applicant had filed a petition opposing the earlier application. At a hearing into that application, the Board had started but not completed an inquiry into the petition in order to determine whether it expressed the voluntary wishes of the employees who had signed it. Subsequent to the hearing and the appointment of a Board Officer to inquire into the applicant's challenges to the list of employees filed by the respondent, the applicant requested leave of the Board to withdraw the application. The Board issued a decision dated September 5, 1984 dismissing the application in view of the stage of the proceedings at which the request to withdraw had been made. The Board did not impose a bar on the applicant with respect to the filing of a new application for the same employees, a discretion which the Board has under section 103(2)(i) of the Act.

5. The applicant filed the instant application on September 4, 1984. The Employees Association of Colautti Construction Ltd. sought to intervene in the application by filing an Intervention, Construction Industry and an Application for Certification by Intervener, Construction Industry. A hearing was scheduled to deal with a variety of issues raised by the application, the interventions, and the reply to the application, including amongst others:

- (1) whether the Board should exercise its discretion under section 103(2)(i) of the Act to bar the application; and,
- (2) the form and sufficiency of the intervener's membership evidence.

6. The documentary evidence filed by the intervener in support of its application consisted of signed receipts for an amount of \$1.00, presumably paid on account of membership dues or initiation fees. The receipts were not accompanied by applications for membership in the intervener. In the result, there is no documentary evidence before the Board that the persons on whose behalf the receipts were filed had applied to join the intervener. The standards for evidence of membership in a trade union are contained in section 1(1)(l)

of the Act and in subsections (1) and (2) of section 73 of the Board's Rules of Procedure. Section 1(1)(l) of the Act provides as follows:

1.-(1) In this Act,

• • •

(1) 'member', when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union, and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union, and 'membership' has a corresponding meaning.

Subsections (1) and (2) of section 73 of the Board's Rules of Procedure further provide that:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

- (i) the return mailing address of the person who files the evidence, objection or signification, and
 - (ii) the name of the employer; and
- (b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

7. The Board heard the submissions of the parties at the hearing respecting the request of counsel for the intervener that it be permitted to call oral evidence of the fact that applications for membership in the intervener were received at the time the dollar was paid to the intervener and the receipts which are in evidence were issued. The Board recessed to consider the parties' submissions and issued the following oral ruling:

For reasons which will be issued later in writing, the Board will not hear oral evidence with respect to whether the persons whose receipts were in evidence before the Board had applied to join the intervener, nor will the Board permit the late filing of such evidence. In the result, the intervener has failed to establish that it has representation rights respecting any employees affected by this application. Therefore, the intervener has no status to intervene in the application and it follows that the intervener has no status as a party to these proceedings.

The Board, having given its ruling, went on to observe that Mr. Steve Clarmo, who was present at the hearing and purported to be an employee of the respondent, might be entitled to status as an employee who has filed a timely, written statement opposing the application by virtue of the fact that he signed the intervention which was before the Board. Counsel for the applicant opposed Clarmo being granted status as a party to the proceedings on the grounds that he was not an employee of the respondent affected by the application. Accordingly, the

Board heard the further submissions of the parties on this issue, recessed to consider the submissions and made the following oral ruling upon resuming the hearing.

(1) Clarmo is not an employee coming within the bargaining unit sought by the applicant and therefore has no direct legal interest in the application.

(2) Since the receipts filed with the Board are not in the nature of individual statements of desire in opposition to the application and since there is no other document before the Board containing any written statement in opposition to the application, the Board does not have the requisite evidence of opposition to the application by employees for whom Clarmo could act as representative.

(3) In the result, there are only two parties to the application and to these proceedings, the applicant and the respondent.

8. The Board's reasons for not allowing oral evidence to establish that the employees who paid a dollar to the intervener and received a receipt for it had, at the same time, applied for membership in the intervener are set out hereunder.

9. Section 1(1)(l) of the Act sets out the two statutory requirements for trade union membership. To be a member of a trade union a person must have applied for membership in it and have paid on his own behalf an amount of at least one dollar in respect of initiation fees or monthly dues of the trade union. Thus, evidence which would establish the fact of membership is evidence which shows that a person has applied for membership in the trade union and has paid at least one dollar in respect of membership dues or initiation fees in the union. In the instant case, the Board has before it documentary evidence of persons paying one dollar to the intervener for something; the receipts do not reveal the purpose of the payment. The Board has no documentary evidence of these same persons having applied for membership in the intervener. The oral evidence which counsel for the intervener was seeking to adduce was to establish that applications for membership in the intervener had been made at the time the dollar was paid and the receipt issued.

10. Subsection (1) and (2) of section 73 of the Rules of Procedure under the Act set certain conditions for the Board's acceptance of evidence of membership in a trade union. Subsection (1) provides that the Board shall not accept evidence of membership in a trade union unless it is in writing and signed by the employee. Subsection (2) provides that the Board shall not accept oral evidence of membership except to identify and substantiate the written evidence of membership.

11. When section 1(1)(l) and subsections (1) and (2) of section 73 of the Rules of Procedure are read together, they make it clear that the Board must have written evidence of two acts by the persons who are claimed to be members of the trade union in question. First, the Board must have written evidence that the persons have applied to become members of the trade union. Second, the Board must have written evidence that the persons have paid at least one dollar on their own behalf in respect of initiation fees or monthly dues of the trade union. The form of receipt in evidence herein is acknowledgement by the intervener of payment of one dollar from someone purported to be a member of the intervener. There is nothing on the face of the receipt to identify the purpose of the payment and, in particular, it does not acknowledge the payment as being in respect of dues or fees of the intervener. Even if the receipt acknowledged that the payment of one dollar was in respect of dues or fees, the Board

still would not have before it written evidence that the employees to whom receipts were issued have applied for membership in the intervener. Clearly, the receipts are not sufficient alone to satisfy both requirements of section 1(1)(l) of the Act and section 73(1) of the Rules of Procedure. The Board was faced with similar circumstances in its decision in *Canadian Underwriters' Association* [1974] OLRB Rep. Feb. 111 wherein the Board had documentary evidence before it in the form of receipts for one dollar paid on account of membership in the trade union, but no evidence that the persons had applied for membership. The Board refused to allow the applicant to adduce at the hearing written evidence because it was too late to admit written evidence. The Board went on to comment in obiter that, even if the applicant had been seeking to have the Board admit oral evidence, section 73(2) of the Rules of Procedure would have prohibited its admission because the purpose of the oral evidence was not to identify or substantiate the documentary evidence, rather it was to supplement it.

12. In the instant case, counsel for the intervener is seeking to call evidence to show that employees applied for membership. In so doing, counsel would be seeking to prove at least one, and in the Board's view both, of the two elements which establish the fact of membership. A review of the Board's decisions will show that the Board has admitted oral evidence to substantiate ambiguous documentary evidence, but it has consistently not admitted oral evidence which goes to establish the fact of membership. It also has consistently interpreted section 1(1)(l) of the Act and subsections (1) and (2) of section 73 of the Rules of Procedure to require evidence of the fact of membership to be in writing. The Board's refusal to accept such evidence except in writing, is wholly consistent with the Board's exclusive authority under section 103(2)(j) of the Act,

... to determine the form in which and the time as of which evidence of membership in a trade union ... shall be presented to the Board on an application for certification ... , and to refuse to accept any evidence of membership ... that is not presented in the form and as of the time so determined;.

13. In the Board's view, that interpretation and the practices carried out in accordance with it is also consistent with the judgement of the Divisional Court in *Re Fisher et al. and Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 et al*, 28 O.R. (2d) 462. The Board had before it in that case a document purporting to be a statement opposing certification of the trade union. The Board had found that document to be ambiguous in that respect and relied on section 73(2) of the Rules of Procedure to exclude oral evidence intending to prove that the document was a statement in opposition to the application for certification. The courts held that the Board had the authority and duty to hear such evidence and to decide on the basis of the documentary and oral evidence whether the documentary evidence as substantiated by the oral evidence, was evidence of opposition to certification. The problem in the instant case is not one of the ambiguity of documentary evidence of membership within the meaning of section 1(1)(l) of the Act, it is an absence of any documentary evidence respecting whether employees have applied for membership in the intervener. Therefore, there is an absence of evidence of membership in the intervener within the meaning of section 1(1)(l), evidence which section 73(1) of the Rules of Procedure says shall not be accepted by the Board unless it is in writing. Thus, there is no written evidence of membership before the Board which might be substantiated by oral evidence in accordance with the principles underlying the judgement in *Re Fullers*. For an analysis of the relationship of *Re Fullers* to the application of section 73(2) of the Rules of Procedure under a fact situation analogous to

the one herein, see the Board's decision in *P.R.C. Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May 749, at paragraphs 30 and 31.

14. The reply to the application raised issues respecting the applicant's membership evidence as well as challenging the applicant's right to bring this application on the heels of the earlier one which had been dismissed by the Board. The respondent contends in the reply that the Board should not place any reliance on the applicant's evidence because a majority of employees in the prior application had . . . evidenced their desire not to be represented by the applicant union.. The respondent further contended that the applicant's membership evidence was equivocal and should be rejected by the Board. The Board received the representations of counsel for the respondent and the applicant on these issues and reserved its decision. The Board has now had the opportunity to consider those representations and its findings are as follows.

15. The petition which was in evidence before the Board in the first application is not in evidence in these proceedings respecting the second application. Therefore, even if the Board accepts respondent counsel's proposition that the petition in the first application was conclusive evidence that a majority of employees did not want the union to represent them, and the Board does not, the Board does not have before it the evidence necessary for making the finding contended by respondent counsel. The contention that the applicant's membership evidence is equivocal is also founded on the petition in the first application. Besides not being in evidence in these proceedings, the Board made no finding in the prior proceedings respecting whether that document expressed the voluntary wishes of the employees who had signed it. Even if it had, it could not import those findings into a new and different proceeding. Therefore, the Board does not have before it evidence which either would cast doubt on whether the applicant continues to enjoy the support of the employees for whom it filed membership documents or which otherwise would cause the Board not to rely on the membership evidence filed by the applicant.

16. Counsel for the respondent advanced several grounds at the hearing to support the reply's contention that the applicant should be barred from bringing this application: the present application was made by the applicant before the Board had dismissed the first one; the applicant had concluded that it was at risk of being in a position where it would not have been entitled to certification without a representation vote; and the applicant further concluded, from the number of employees who had signed the petition, that it would be unable to win a representation vote. Counsel contended that, by withdrawing the first application and filing the instant one, the applicant had deliberately sought to avoid having the true wishes of the employees being disclosed in a representation vote.

17. The Board has discretion under section 103(2)(i) of the Act to refuse to entertain a new application for certification by a previously unsuccessful applicant within ten months from the date of dismissal of the unsuccessful application. The same section also gives the Board the discretion to bar an unsuccessful applicant from filing a new application within ten months of the date of dismissal of the unsuccessful application. As noted above, the Board did not apply a bar to a new application when it dismissed the earlier application by its decision which issued September 5, 1984. Where no bargaining rights are already held for employees affected by the application for certification in question, it has been the Board's long standing policy and practice to exercise its discretion under section 103(2)(i) to bar a new application when an earlier one has been dismissed where the employees' wishes have been

tested in a representation vote and the applicant has lost the vote. In those cases, the Board automatically applies a six-months time bar when dismissing the application following the taking of the vote. Where the views of the employees in the bargaining unit have not been ascertained, in other words, where no representation vote has been held, the Board will not impose a bar as a general rule. For an example of the circumstance where the Board has imposed a time bar, see the Board's decision in *Master Insulation Co. Ltd.*, [1981] OLRB Rep. Jan. 94 and for an example of the circumstances in which it has not imposed a bar, see the Board's decision in *Sonora Cosmetics*, [1982] OLRB Rep. June 954.

18. Where the Board has directed the taking of a representation vote and the applicant requests leave to withdraw its application before the vote is taken, the Board will dismiss the application and direct the applicant's attention to the Board's decision in *Mathias Ouellette*, 56 CLLC 18,026. If the applicant files a fresh application within six months from the date of the dismissal of the first one, the Board will require the applicant to show cause why the Board should entertain the new application. The underlying rationale for this approach was discussed in the following terms by the Board in its decision in *Erie & Huron Beverages Limited*, [1979] OLRB Rep. July 640, at paragraph 4:

4. . . . As well, the Board has consistently taken the position that a union should not be allowed to anticipate defeat in a representation vote and escape a bar by withdrawing its application after a vote has been directed but before it has actually been taken. The Board recognizes, however, that there may be circumstances other than an anticipation of defeat and a desire to avoid a bar motivating a union to withdraw its application between the direction and taking of a vote. Instead of evaluating the circumstances surrounding the withdrawal at the time of the request for withdrawal, the Board in these circumstances normally issues a caution to the applicant that in the event it brings a new application within six months it will bear the onus of establishing that special circumstances existed to warrant the new application being heard.

19. The Board has made exceptions to its general approach in exercising its discretion to bar fresh applications in circumstances which might be described as special and extreme, such as when there have been numerous unsuccessful applications for certification made within a very short period of time. In this respect see the Board's decision in *J. W. Crooks Company*, [1972] OLRB Rep. Feb. 126 and the Board's obiter comments in its decision in *Sonora Cosmetics*, *supra*.

20. None of these grounds for refusing to entertain a second application for certification after an earlier, unsuccessful one are present in the instant application. Nor is the fact that the Board had not actually issued its decision dismissing the applicant's first application by the time that it filed the second one of itself grounds for prohibiting the second application. See the Board's decision in *The Bristol Place Hotel*, [1979] OLRB Rep. June 486.

21. Counsel for the respondent has argued, however, that the employees and the employer have been prejudiced by the filing of the second application immediately upon the applicant's request for leave to withdraw its first application because, by seeking to withdraw the first one at a stage in the proceedings when the Board had already held a full day of hearing and was in the midst of conducting its customary inquiry into the circumstances surrounding the filing of a petition in opposition to the application, the applicant has tried deliberately to avoid having the true wishes of the employees disclosed by a vote in the first application. Counsel contends that those circumstances provide proper and sufficient reason for the Board to refuse to entertain the application.

22. The Board does not agree with counsel that the effect of the applicant filing the instant application following upon dismissal of the prior one frustrates the determination of the true wishes of the employees. The membership evidence filed by the applicant is evidence which supports an inference that the employees who applied for membership in the applicant wished at that time to have the applicant represent them in collective bargaining with the respondent. Absent any evidence which rebuts that inference or raises a doubt that, at the terminal date of the application, the employees still wished to have the applicant represent them, the Board will act upon the evidence. The Board will certify the applicant without a representation vote if it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the applicant. The Board will direct that a representation vote be taken if not less than forty-five per cent and not more than fifty-five per cent of the employees in the bargaining unit are members. If more than fifty per cent of the ballots cast are cast in favour of the union, section 7(3) of the Act mandates the Board to certify the applicant. If less than forty-five per cent of the employees are members of the applicant, the application will be dismissed. No matter which result prevails, the Board will have ascertained the true wishes of a majority of the employees pursuant to the statutory majoritarian standards. It cannot be said in those circumstances that the Board's failure to give account to a document which is not before it is failing in its duty to ascertain the true wishes of the employees with respect to the application. Furthermore, when this application was made, any employees who were opposed to it could have expressed their opposition in writing, by filing a petition or, as they appear to have attempted to do, put their support behind a competing trade union. Since the intervener's application was dismissed for the reasons given above and since there was no other statement in opposition to the application for certification which would raise doubt as to whether the applicant continued to enjoy the support of the employees for whom it has filed membership evidence, that evidence must be accepted as proof of the true wishes of the employees who are members of the applicant.

23. In these circumstances and for the foregoing reasons, the Board will not exercise its discretion under section 103(2)(i) of the Act to refuse to entertain this application.

24. It was necessary for the Board to adjourn the hearing into the application before it could deal with the issue of the appropriate bargaining unit. However, as the Board found in paragraph 3 above, this is an application made pursuant to section 144(1) of the Act which is set out in that paragraph. The wording of section 144(1) mandates that the appropriate bargaining unit be one which shall . . . include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area In this respect, the applicant has proposed a bargaining unit described in terms of the trade which it customarily represents in the construction industry as follows:

All employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman; and, all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

The reply to the application proposes a bargaining unit described in the following terms:

All employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those engaged in the repairing and maintaining of same in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell.

25. A provincial agreement as defined in section 137(1)(e) of the Act is . . . an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, The collective agreement between the designated employee bargaining agency named in paragraph 2 of this decision and the operating engineers employers' agency, which is the designated employer bargaining agency, is a provincial agreement as defined by section 137(1)(e) of the Act, insofar as the agreement pertains to the ICI sector of the construction industry. Should the Board certify the applicant for a unit of employees which includes the ICI sector, by operation of section 145(3) of the Act, the applicant and the respondent would immediately be bound to the operating engineers provincial agreement. Since that agreement is one which, by statute, must describe a provincial unit of employees and since section 144(1) mandates that the appropriate bargaining unit be described in terms of all employees who would be included in the provincial agreement, the appropriate unit in this application would have to be described in terms compatible with those requirements. The applicant's description satisfies this requirement, the respondent's does not.

26. Therefore, the Board finds that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

27. Counsel for the applicant claims that Elio Bolzanello, Danny Kennedy, James McKinley, Giuliano Pluviatti and William Scorgie were not employed in the bargaining unit for a representative period of time prior to the making of the application. Furthermore, counsel contends that Eric Montague exercises managerial functions within the meaning of section 1(3)(b) of the Act. Therefore, a Board Officer is authorized to inquire into and report to the Board on the list and composition of the bargaining unit described above and on the duties and responsibilities of Eric Montague.

28. This application is referred to the Registrar for the appointment of the Board Officer.

3367-84-R Consolidated Beef Corporation Employees' Association, Applicant, v. Consolidated Beef Corporation, Respondent, v. United Food and Commercial Workers International Union, Intervener

Trade Union Status – Whether appropriate steps followed in formation of employee association – No evidence of management involvement – Board satisfied with viva voce evidence surrounding formation – Status granted

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *R. J. Trafford*, *Harvey J. Sims*, *Clare Davis* and *Michael Hood* for the applicant; *Paul Seitz* for the respondent; *A. M. Minsky, Q.C.*, for the intervener.

DECISION OF THE BOARD; May 6, 1985

1. This is an application for certification in which the applicant must prove that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. By agreement of the parties, the hearing was restricted to the issue of trade union status.
2. The applicant called one witness regarding the formation of the employees' association and submitted a number of relevant documents; the intervener called two witnesses.
3. Since late February, M. Hood has been employed by the respondent Consolidated Beef Corporation as a relief man, with some clerical responsibilities as well. He stated he previously worked at Burns and a small plant in Innerkip. On cross-examination, Hood admitted he had worked at the same location as the respondent's plant (305 Arnold St.), but for Pacific Labour Services, for two weeks in September 1984, also as a relief man. [For clarity, Pacific Labour Services and Flavour Land Beef were declared by the Board to be related employers within the meaning of section 1(4) of the Act on July 6, 1984, File Nos. 0312-84-R, 0313-84-R.] Hood stated he had not known that the intervener was certified with reference to Pacific Labour Services/Flavour Land Beef at the time he worked there. At Burns, Hood worked for six years in the killing operation, then five years in a management position and, finally, eight months in the hog operation. He stated the return to the bargaining unit was voluntary. Hood testified he heard about the plant opening at 305 Arnold Street from an individual previously employed at Flavour Land Beef, applied for the job, was hired by R. Miller and started almost immediately. Hood knew Miller from his days at Burns, where Miller was plant superintendent, and, before that, at J. M. Schneiders.
4. Hood testified he liked the employees' association at Schneiders and had disliked the union representing the employees at Burns. Although Hood incorrectly identified the name of the union at Burns, it was clarified that that union was, in fact, the intervener. Hood said he also had talked with former employees at Norstern Meat Packers, a packing plant at 305 Arnold St. prior to Flavour Land Beef, who had lost their jobs when the plant closed after a strike. To summarize, in his words, Hood had "bad feelings about unions in the industry but had liked the employees' association at J. M. Schneiders. Shortly after starting work at Consolidated Beef Corporation, Hood said he discussed the possibility of an employees' association with the other three employees then at the plant. What triggered the discussions,

according to Hood, was his sighting of S. Szuba at the plant in the first week of March. Hood and Szuba had worked together at Burns and Szuba was known to Hood as a union field representative. Hood said he thought Szuba was at the plant on union business. Hood testified he was in the back hallway painting when he saw Szuba leave the plant. Events followed rapidly thereafter. Hood obtained the name of counsel from a friend in the police department, called counsel on March 8th, and met with counsel that same day at 4:00 p.m. accompanied by C. Davis, another employee. On the 8th, there was a general discussion about forming an employees' association; two days later, after discussing matters again with the other employees, Hood said he instructed counsel by telephone to prepare the necessary documents.

5. Hood denied ever talking to Miller about the association. When asked about requesting permission to leave the plant to attend the meeting with counsel, Hood replied that, as the employees were merely doing housekeeping chores, there were no set hours at that time. The employees were given a list of jobs at 8:00 a.m. and, when that work was completed, were free to leave.

6. All four employees (Hood, Davis, DeSousa and Roberts) met at counsel's offices shortly before 4:00 p.m. on March 13, 1985. The first meeting followed an agenda: Hood was chosen Chairman of the meeting; the draft constitution prepared by counsel was reviewed and approved; the meeting was adjourned. Minutes were typed and signed by the employees present. The four employees signed applications for membership, indicating payment and receipt of \$1.00; the applications were witnessed. A second meeting commenced at 4:20 p.m. and also followed an agenda: Hood was chosen Chairman; the applications for membership in the association were accepted; the constitution was amended to combine the positions of secretary and treasurer and then ratified; individuals were nominated for elected positions; officers elected and sworn in were Hood (as president) and Davis (as secretary/treasurer); counsel were instructed to apply for certification; the meeting was adjourned. Minutes of this meeting were likewise typed and signed by those employees present.

7. Hood also testified that, as of the March 13th meeting, there were only four employees at Consolidated Beef Corporation but that the number of employees rose to roughly thirty-six about one week thereafter.

8. The intervener called two witnesses, S. Szuba, a business agent for Local 617, and C. Gibson, a business representative as well as secretary/treasurer of the local.

9. Szuba testified he knew Hood when they both worked at Burns two years ago. Szuba initially worked under Hood's supervision; Hood, in turn, reported to Miller. Szuba was still at Burns when Hood left his management position and returned to the bargaining unit. On the evening of March 7, 1985, Szuba stated he received a telephone call informing him that the operation at 305 Arnold Street was reopening. Szuba relayed this information to Gibson at their meeting on March 8th. The two agreed, as a matter of convenience given Gibson's schedule, to appear at the plant unannounced on March 12th at 9:30 a.m. (subsequently changed to 11:00 a.m.) to discuss the intervener's successor rights. Szuba testified he and Gibson, after waiting for 20-25 minutes, did talk with Miller for 10-15 minutes on the 12th but that he had not previously attended at 305 Arnold Street. Szuba stated he did not see Hood at the plant on the 12th and, in fact, did not know there were any employees working at the time, just that the company was taking applications.

10. Gibson confirmed Szuba's testimony with respect to the arrangements for and the meeting of the 12th. Gibson added that, because of his elected position in the local, he is aware of Szuba's activities. To the best of his knowledge, Gibson stated that Szuba had not attended at 305 Arnold Street prior to March 12th.

11. Counsel for the applicant argued that all the steps necessary for the recognition of an employees' association within the meaning of section 1(1)(p) of the Act had been followed. The evidence in respect of those steps was briefly reviewed; counsel referred to Sack & Levinson, *Ontario Labour Relations Board Practice* (Butterworths, 1973), at Chapter 3, particularly page 54, in support. With respect to the apparent contradiction between the testimony of Hood and Szuba regarding the latter's appearance at the plant prior to March 12, 1985, counsel made several submissions. Firstly, this point was irrelevant to the issue of trade union status since the intervener had not called evidence to challenge the evidence indicating that all appropriate steps had been followed. Secondly, as either Hood or Szuba could be mistaken or lying about a visit prior to March 12th, the Board should not readily infer one was lying on the point. If, however, there was to be a test of credibility, counsel contended that Hood's testimony, taken as a whole, was more credible than Szuba's. Further, even if Hood was lying on this point, that did not support an inference that his testimony should be discounted entirely, particularly where the intervener had not filed any charges of management involvement in the employees' association nor called any evidence of such involvement.

12. Counsel for the intervener asserted that the credibility of the sole witness for the applicant was critical, otherwise the applicant would not have satisfied the onus of tendering credible oral (*viva voce*) testimony regarding the circumstances surrounding the formation of the association. Counsel referred to Sack & Mitchell, *Ontario Labour Relations Board Law and Practice*, (Butterworths, 1985) at 3:2110 and *Repac Construction and Materials Ltd.*, [1977] OLRB Rep. Sept. 582. Counsel argued the apparent discrepancy between Hood's and Szuba's testimony was fundamental. If Hood was lying on this point, and counsel asserted he was, then the purported trigger for the formation of the employees' association was not as stated. Counsel contended it would then be a reasonable inference that there was management interference in the association's formation given that Hood and Miller were formerly in management at Burns. Counsel further questioned Hood's omission of the two weeks' worked at Flavour Land from his testimony regarding previous employment and the credibility of Hood's statement that he (Hood) was not aware of the intervener's certification at Flavour Land. In contrast, counsel argued Szuba's testimony had stood up through vigorous cross-examination. In summary, counsel asserted Hood's testimony in its entirety should be given no weight, the association should be found not to be a trade union within the meaning of section 1(1)(p) of the Act and, accordingly, the application should be dismissed.

13. Section 1(1)(p) of the Act reads:

1.-(1) In this Act,

- (p) trade union means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

14. The Board must first deal with the issue of credibility. In assessing credibility, the Board has looked to the usual factors, including the consistency of the testimony, the firmness of the recollections, the apparent ability to resist the influence of self-interest to modify recollections, the demeanour while testifying, the responses in cross-examination and what seems to the Board to be reasonably probably when the circumstances and the testimony of the witnesses are considered. The Board considers that the witnesses Szuba and Gibson were truthful with respect to the sole visit by Szuba to the plant occurring on March 12, 1985. However, this conclusion by the Board does not require a determination that Hood was lying when he testified that he saw Szuba at the plant in the first week of March. The Board has carefully reviewed Hood's evidence on this point. While Hood was firm in his belief that he saw Szuba, the testimony indicates Hood saw Szuba exiting the plant while Hood was in the back hallway painting. In the Board's view, it is probable that Hood was mistaken in his conclusion that the man he saw was Szuba but was not fabricating this incident. The Board grounds this conclusion not just on a mere possibility of a mistake by Hood on this sighting but on consideration of Hood's general credibility; his testimony was given in a straightforward manner without evasion. Counsel for the intervener properly pointed out that, in chief, Hood had omitted his employment at Flavour Land the previous Fall. However, that period of employment was only for two weeks as a relief man and Hood thought his employer was Pacific Labour Services. Further, Hood also omitted his six-year employment at J. M. Schneiders when recounting his employment history. On balance, then, the Board is not prepared to infer a more sinister meaning to the omission of the two-week stint at Flavour Land.

15. The intervener filed no charges of management involvement in the formation of the employees' association, nor was there any direct evidence led of such interference. The intervener's assertion of management interference (which would, of course, affect the certification application by virtue of section 13 of the Act) flowed from the submission that Hood was lying as to the sighting of Szuba in the first week of March, given that it was the sighting which triggered the formation of the employees' association shortly thereafter. The intervener's argument, then, fails given the Board's conclusion regarding the apparent discrepancy between Hood's and Szuba's testimony. The Board need not deal with the submission of counsel for the applicant that, even if Hood was lying in the sighting, this would not preclude a finding of trade union status. Further, the Board need not speculate as to why Hood thought it was Szuba leaving the plant that day: his conclusion may have myriad causes and that analysis is more appropriate to other disciplines. It is sufficient for the Board to conclude that Hood genuinely believed he saw Szuba in the first week in March.

16. It is convenient to summarize the steps needed to form a trade union within the meaning of the Act by setting out the following passage, including footnote, from *Sack & Mitchell*, *supra*, at 3:2150:

The Board has said that the following steps should be taken to form a *bona fide* trade union: (1) a constitution should be drafted setting out, among other things, the purposes of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings; (2) the constitution should be placed before a meeting of employees for approval; (3) the employees attending such meeting should be admitted to membership or, if they have joined before, should be confirmed as members; (4) the constitution should be adopted or ratified by vote of the said members; (5) officers should be elected pursuant to the constitution.

Local 199 U.A.W. Building Corp., [1977] OLRB Rep. July 472; *E.B. Eddy Forest Products Ltd.*, [1977] OLRB Rep. Oct. 694; *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797; *Canteen of Canada Ltd.*, [1978] OLRB Rep. Sept. 802; *Brant County Board of Education*, [1979] OLRB Rep. Feb. 70; *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB Rep. June 498; *National Steel Car Corp. Ltd.*, [1979] OLRB Rep. June 542; *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889; *Cambridge Motor Hotel*, [1980] OLRB Rep. Dec. 1725; *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. June 763.

Given Hood's testimony and the documentary evidence, the Board has no difficulty in finding that the appropriate and necessary steps were, in fact, followed. Indeed, counsel for the intervener did not assert critical steps had been omitted; rather the challenge was grounded on a rejection of Hood's testimony on the basis that, if Hood lied on one point, the rest of his testimony was suspect.

17. The Board finds that the applicant has satisfied the Board that the association is a viable organization with a duly adopted constitution and duly elected officers who can act on behalf of the organization. The constitution contains an objects clause which encompasses labour relations purposes. There has been presented credible *viva voce* testimony as to the circumstances surrounding formation of the association. In these circumstances and for the foregoing reasons, the Board finds the applicant to be a trade union within the meaning of section 1(1)(p) of the Act.

18. Accordingly, this matter is hereby referred to the Registrar. The dates for the continuation of the hearing have already been set with the agreement of the parties. That hearing is to deal with the allegations by the intervener regarding sections 63 and 1(4) of the Act. The respondent agreed to produce Mylo Shantz and Garry Keller as witnesses at the next hearing date without further subpoena or conduct money. The Board notes that the applicant reserved its right not to attend the hearings with respect to sections 63 and 1(4) issues without prejudice to its certification application. The Board also notes that the intervener has put the applicant on notice that an argument to order a representation vote under the build-up concept may be raised, if necessary, when the certification application is to be finally resolved. Finally, this panel is not seized in respect of the remaining issues.

0814-84-R The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, Applicant, v. **Corecon Developments**, Respondent

Certification – Practice and Procedure – Employer filing Schedule A with eight names – Not making any reservation or qualification – Seeking to add five other names at commencement of LRO meeting – Additional information within employer's knowledge at time of initial filing – Amendment to list sought refused

BEFORE: *D. E. Franks*, Vice-Chairman, and Board Members *D. H. Blair* and *S. O'Flynn*.

APPEARANCES: *Michael A. Church*, *John Cartwright* and *Jim Smith* for the applicant; *W. J. McNaughton* and *K. Haggerty* for the respondent.

DECISION OF THE BOARD; May 6, 1985

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*. The application was filed on June 21, 1984 and the terminal date was July 3, 1984. On the terminal date the respondent employer in this matter filed with the Board a reply and a list of employees in Schedule A containing the names of eight persons listed as carpenters. Subsequently, the applicant trade union challenged the list of employees filed by the respondent and in due course a Labour Relations Officer was appointed in this matter. The Labour Relations Officer did a payroll check of the respondent's employees and arranged for subsequent meetings of the parties on August 13 and 15, 1984. The first meeting of the parties took place on August 15, 1984 and at that time the respondent raised for the first time the issue that there should be five additional names added to the list of employees in Schedule A.

2. The applicant disputed the request by the respondent to add those names at that time, nevertheless the Labour Relations Officer embarked on his inquiry. Subsequently, the parties referred to this Board a number of issues which had arisen in the course of the inquiry by the Labour Relations Officer, one of which referred to the addition of the five additional employees to the list in Schedule A. By a decision dated September 6, 1984 another panel of this Board deferred dealing with the issue of whether or not the names should be considered until a panel of the Board dealt with the Labour Relations Officer's report. Immediately following the release of that decision on September 13, 1984 the parties in a document referred to as Minutes of Settlement agreed that Mr. Udo Gerzysch on the list of employees in Schedule A filed by the respondent was not an employee in the bargaining unit. The parties also agreed that there were two further issues to be referred to the Board for its final and binding determination:

(i) the respondent's request to add six (6) additional names to the list of bargaining unit employees originally filed by the respondent;

(ii) the validity of the Examiner's ruling that the parties be allowed to question the witnesses in respect to the 30-day period preceding the application but not in respect to events outside said 30-day period.

3. When the matter came up for hearing subsequent to the release of the Labour

Relations Officer's report, the Board raised with the parties the matter of the additional names to be added to the list of employees and the parties agreed that if the Board found that the names should not be added the matter would be disposed of by the issuance of a certificate without the conduct of a representation vote since the applicant would have more than the required fifty-five per cent of the employees in the bargaining unit. However, should the Board decide to allow the respondent to add the additional names to the list of employees then there were further issues to be dealt with including the challenge by the applicant of the five additional names to the list.

4. The Board then heard the submissions of the respondent employer concerning the facts and the representations to be made with respect to the adding of the five additional names to the Schedule A originally filed with this application. The respondent's position is that the original list of eight names filed in this matter was a result of Mr. Haggerty of the respondent conferring with the bookkeeping department of the respondent, and deciding that of some thirteen or more employees, eight were carpenters and therefore on the list of employees. As a consequence of that information, the respondent filed the list in Schedule A. At this time counsel for the respondent alleges that Mr. Haggerty made inquiries concerning certain detailed documents concerning the work performed by various persons on the various job sites but that they could not be found. The position of the respondent is that these documents did not come to light until the day before the Labour Relations Officer convened his hearing into the challenges on the list of employees filed in Schedule A. In these circumstances, the respondent therefore seeks the leave of this Board to add the additional five names to the list of employees in Schedule A.

5. At the hearing in this matter, the Board denied the request by the respondent for leave to amend the Schedule A as filed and informed the parties it would accordingly be certifying the applicant herein. We are of the view that the list filed in this matter containing the names of eight employees was made by Mr. Haggerty at the time when he knew of the additional evidence upon which he seeks to add the five additional employees. The fact that he could not locate it does not detract from the further fact that they were in possession and control of the respondent at all material times. In turn, Mr. Haggerty for the respondent, relied on certain bookkeeping documents to determine that eight of his employees were carpenters and indeed counsel for the respondent noted that the additional five employees were indeed paid less than the eight employees classified as carpenters in the Schedule A filed with the reply. In so doing, however, Mr. Haggerty made no reservations that there may in fact be other employees who were performing carpenters' work on the date of the making of the application. Nor, was such a qualification made when the Labour Relations Officer did a records check of the employer concerning the list in Schedule A. In these circumstances, we are of the view that the respondent cannot at this later point in the proceeding seek to add the five names it seeks to add. The Schedule A filed in this matter at a timely fashion is in effect a statement which says of the employees I have these eight employees are carpenters falling within the bargaining unit proposed by the applicant trade union. In the absence any reservation or qualification to that statement, it is clearly too late for the employer at the commencement of the proceedings by the Labour Relations Officer to seek to add the names of additional employees who might have been performing carpenters' work on the date of the making of the application. To allow the respondent to make such an amendment to the list would be to render meaningless the requirement in the Rules that the appropriate Schedule A be filed by the terminal date. For the foregoing reasons, therefore, the request by the respondent was denied.

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[Balance of decision omitted: Editor]

1052-84-R Labourers' International Union of North America, Local 183, Applicant,
v. **Di Marco Plumbing and Heating Company Limited**, Respondent

Certification – Construction Industry – Employee – Practice and Procedure – Employee hired as backhoe operator and paid premium rate – Performing labourers' work when backhoe work not available – Doing only labourers' work on application date and on particular project – Board examining representative period to determine whether individual in labourers' or operating engineers unit – Whether construction foreman excluded as non-working foreman

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *L. Steinberg* and *R. Lotito* for the applicant; *Jane Ford* and *Ted Di Marco* for the respondent.

DECISION OF THE BOARD; May 31, 1985

I

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The applicant is seeking to represent a bargaining unit of labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board area #8, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

3. The respondent initially filed a list of four persons employed by it on the date that this application was made. Subsequently, it was agreed that the person described as cement finisher was not properly included on the list. The applicant took the position that it had filed evidence of membership with respect to two of three persons remaining on the list and whom it believed to be employed by the respondent as labourers on the date the application was made. The employer asserted that two persons should be deleted from the list as filed, arguing that Gaetano Annibale should more appropriately be grouped in an operating engineers' unit and that Paolo Reda should be excluded from the bargaining unit because he is a supervisor who exercises managerial functions within the meaning of section 1(3)(b) of the Act.

4. The Board appointed a Labour Relations Officer to inquire into the list and composition of the proposed bargaining unit. A transcript of the evidence was produced and included in the Officer's report. Following the release of that report, the parties appeared before the Board and made argument as to their respective positions. The applicant argued that all three persons on the list were labourers and formed an appropriate bargaining unit. The respondent maintained that Annibale was a heavy equipment operator and, therefore, belonged in an operating engineers' unit; and that Reda was properly excluded from the unit as being a non-working foreman. In the construction industry, *non-working* foremen are typically excluded from the bargaining unit, whereas, working foremen are treated in roughly the same way as lead hands in an industrial setting, who are typically included in the unit.

The working foreman has some skills, duties and responsibilities which are different from those of his fellow employees, but, like them he works at the tools, and seldom exercises the degree of decisive and independent authority over them to warrant exclusion pursuant to section 1(3)(b).

II

5. Turning first to the status of Annibale, the evidence establishes that on the date of the present application, he was engaged totally in the performance of labourers' work. On the other hand, the evidence also establishes that Annibale alone was responsible for the operation of the backhoe, the dump truck, and the load machine. He was also given the use of a panel truck in which fuel, oil, and tools were kept in order to maintain the heavy equipment. There is some discrepancy in the evidence as to the frequency in which Annibale was called on to operate the heavy equipment.

6. The applicant argued that the Board should look only at the work performed July 19th, that being the date of the present application, and referred the Board to the following cases: *R. S. Hardy Construction Limited*, [1968] OLRB Rep. May 227; *Rainey Brady*, [1969] OLRB Rep. March 1350; and *George Asmussen Limited*, [1971] OLRB Rep. Oct. 683. The respondent took the position that Annibale was engaged in more than one trade, and that his performance of labourers' duties on the application date is not determinative of his status. The Board was referred to *Desbuild*, [1983] OLRB Rep. Nov. 1793.

7. The evidence establishes that Annibale was hired as a backhoe operator, and that he is the only employee who operates heavy equipment when such work is needed, however, as noted, no heavy equipment work was performed on the date of the application. In these circumstances, the Board considers it appropriate to look to a representative period rather than solely the date of the making of the application. Although no argument was made as to the period of time which should be considered representative, in choosing a representative period, the Board has looked to the nature and duration of the job. It appears that the employer was typically engaged in jobs measured primarily in days rather than weeks or months. At the examination, Annibale was questioned as to work performed in a prior two-week period, during which the employer worked on five different job sites, all of which were houses. The union did not adduce any evidence as to any other period. In all the circumstances, we think that this two-week period is sufficiently representative of Annibale's job duties. Unfortunately, the evidence concerning those duties was neither very clear nor complete – probably because of the usual problems of recollection, and the fact that factors which might be significant to this Board, would not be very significant to individual employees who would move from job to job, and function to function as the needs required. The result, however, is a somewhat murky picture in which both parties can point to factors in support of their positions, but neither can claim that the result is obvious.

8. Annibale gave evidence that during this two-week period he had worked on a number of jobs and would typically operate the backhoe all day. Counsel listed a number of work sites on which he had performed such work, and Annibale confirmed that running the backhoe was his main activity. Felice Morra gave evidence that the backhoe would be used for the day or the four or five hours he would take to dig the house; however, even this characterization suggests that Annibale spent the majority of his time in this activity. He was paid a premium rate precisely because he could operate a backhoe. While it is clear that when there was no backhoe work to be done, Annibale performed labourers' work, and, in fact,

performed only labourers' work on the project in question, we must find on the evidence that, within the period in question, he spent a majority of his time doing work typically performed (or at least claimed) by employees in an operating engineers' bargaining unit.

9. Turning to employee Reda, the question is whether in construction industry parlance he is a non-working foreman who, *in the opinion of the Board*, exercises managerial functions within the meaning of section 1(3)(b) of the Act. If he is a non-working foreman, he is properly excluded from the bargaining unit.

10. The evidence establishes that Reda has the conventional duties of a construction foreman: he reads plans, requests materials, organizes work, and generally supervises the labourers. He gave evidence that he voluntarily works – he helps the crew if he chooses to do so. When pressed for an estimate of how much physical work he performed, he stated that he worked only about one-half hour of an eight-hour day with the crew. What, if anything, he might have been doing for the rest of this time, is not very clear, and it seems unlikely that he would have been idle, or that, in a functional sense, two or three employees would require a manager within the meaning of section 1(3)(b) of the *Labour Relations Act*. Reda had no clear memory of how much he dug, or how much pipe he laid. Morra, on the other hand, stated that Reda worked most of the day with the men, and gave the figure seventy-five per cent. He said that Reda helped unload the truck, dug trenches, laid pipe, and connected pipe joints regularly throughout the duration of the project.

11. In the Board's experience, a small crew such as this, regularly employing only three to four persons, would not likely carry a non-working foreman engaged to perform managerial functions. This is confirmed by the totality of the evidence. Mr. Reda's filling out time cards, and scheduling – are not such as to justify his exclusion from the unit. Nor do we think that he has the power of effective recommendation. He cannot authorize overtime, save in an emergency; he cannot make the decision to stop work in inclement weather; he cannot authorize significant time off; and he does not discipline employees. There was some evidence that he was involved in the termination of an employee, but he appears to have intervened without the express authority to do so, and precipitated an it's him or me situation. When the evidence is considered as a whole, it is the Board's opinion that Mr. Reda is an employee under the Act who should properly be included in the applicant's proposed bargaining unit.

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[Balance of decision omitted: Editor]

3027-84-U International Beverage Dispensers and Bartenders Union, Local 280, Complainant, v. Metro Investment Corporation c.o.b. as **Doyles Tavern**, Anthony Indovina, and Last Resort Hotel Inc., Respondents

Arbitration – Discharge for Union Activity – Unfair Labour Practice – Allegation of total repudiation of union and agreement and unlawful discharge of employee – Board not deferring to arbitration – Finding violations of Act

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Beth Symes*, *James Jackson* and *Joe Leithwood* for the complainant; no one appearing for the respondents.

DECISION OF THE BOARD; May 15, 1985

1. The names of the respondent are amended to add Last Resort Hotel Inc..
2. This is a complaint under section 89 of the *Labour Relations Act*, alleging a violation of various sections of the Act, and in particular sections 50, 64 and 66.
3. The complaint alleges that the grievors, members of the complainant, have been dealt with unlawfully by one or more of the named respondents in a number of respects. In summary, these are:
 - (a) that the respondent or respondents repudiated the complainant's collective agreement and advised the employees that they would henceforth be paid at a new, lower rate;
 - (b) that the respondent or respondents terminated the employment of Donna Sheppard because she objected to the repudiation of the complainant's collective agreement and threatened to take the respondents to the Labour Board;
 - (c) that the respondent or respondents advised the employees that it would be changing the method of payment by holding wages back for a week, and have in fact failed to pay wages and vacation pay owing to the employees as of the date of the Tavern's closure.
4. It is apparent that at least a portion of the above claims would normally be the subject matter of grievance-arbitration, and not of proceedings before the Labour Relations Board. The case involves, however, elements well beyond a failure to abide by the provisions of a collective agreement, and it is this mix of contractual and unfair labour practice elements which has prompted the Board in the past to exercise its jurisdiction under section 89 of the

Labour Relations Act. As the Board wrote in *Valdi Inc.*, [1980] OLRB Rep. August 1254, the principal case dealing with this issue:

7. . . . This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties . . . However, where key provisions of the *Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction.

[emphasis added]

In the present case there is, apart from the alleged total repudiation of the trade union and its collective agreement, the further allegation of a matter which would fall clearly within the jurisdiction of the Board, and that is the alleged termination of Donna Sheppard as a consequence of her threatening to complain to the Labour Board about the employer's repudiation. In the exceptional circumstances present here, therefore, the Board is persuaded that all of the related matters set out in the complaint are properly before it.

5. It should be noted that the respondents, although duly notified by the Board in writing through the respondent, Anthony Indovina, of the time and place of these proceedings, failed to appear at the hearing which took place on the scheduled date. It might also be noted that Mr. Indovina represented the respondent Metro Investment Corporation before the Board at a related hearing on April 4, 1985 (File No. 3028-84-R), at which time Mr. Indovina agreed with counsel for the complainant on the date that the present complaint would be heard. Neither the Board nor the complainant received any subsequent indication from the respondents that they would be unable to attend on the date agreed upon.

6. The instant tavern has recently formed the subject matter of a number of Board proceedings. In Board File No. 1888-84-R, reported [1984] OLRB Rep. December 1700, the Board found that a sale of a business to Last Resort Hotel Inc., operating as Doyle's Tavern, had taken place, within the meaning of section 63 of the *Labour Relations Act*, and that the bargaining rights of the complainant herein accordingly continued. The respondent was represented in those proceedings by Mr. John Doyle and Mr. Anthony Indovina. Following the Board's decision, Mr. Doyle, whom the evidence establishes was at the material time the licence-holder and manager of Doyle's Tavern, entered into a collective agreement with the complainant (being the complainant's master agreement) on January 15, 1985. Mr. Doyle testified that on January 17th, he was told by Mr. Indovina that he, Indovina, was exercising his option to buy up Mr. Doyle's shares in Last Resort Hotel Inc., and that Mr. Doyle was out. Mr. Doyle then advised the employees that Mr. Indovina was taking over the Tavern, and left (never to return).

7. On or about January 18, 1985, the complainant's Secretary-Treasurer, Jim Jackson, delivered to the Tavern two copies of the collective agreement which Mr. Doyle had signed. He left these with the new manager whom Mr. Indovina had installed, Andy Adams. In the course of the following week Mr. Indovina met with each one of the waitresses and bartenders in the complainant's unit and told them that he had taken over and that their hourly rate was being cut, effective the Monday of that week. Only Ms. Sheppard, the Union steward, voiced any real objection, saying that Mr. Indovina could not ignore the contract that way, and saying

she would take him to the Labour Board. Mr. Indovina replied that she could do what she wanted, that he was in charge now and the rules were his own. Mr. Indovina also advised each of the employees that he would henceforth be paying the employees their wages one week in arrears.

8. On Friday of that week, being January 25th, Ms. Sheppard learned that her brother had been taken to hospital with a suspected tumor, and arranged with Mr. Adams and Mr. Indovina to miss her scheduled shift for that evening. On Saturday afternoon she attended at the Tavern and advised Mr. Adams that she was returning to the hospital, and that if her brother's condition had not improved, she would not be in for her shift that evening either. Mr. Adams replied that that was no problem, and that her shift could be covered in the same way that it had been on the previous night.

9. On the following Monday Ms. Sheppard learned she had been left off the new work schedule and was no longer employed at the Tavern. She telephoned Mr. Adams and was told she would have to speak to Mr. Indovina. Mr. Indovina advised her she had been terminated for failing to report for her scheduled shift on Saturday. Ms. Sheppard responded that she had discussed that with Mr. Adams in the afternoon prior to her shift, but Mr. Indovina cut her short and said he did not wish to talk about it. Ms. Sheppard was never re-hired. In the latter part of February, the Liquor Licence Bureau of Ontario was formally advised by Mr. Doyle that he, the licence-holder, was no longer involved in Doyle's Tavern. The Bureau apparently responded by revoking the licence, and the Tavern was closed as of February 21st. The premises are, apparently, once again for sale. All of the grievors' requests for unpaid wages and their separation certificates have gone unheeded.

10. It should be noted, finally, that the complainant trade union, when it received word of the take-over on January 17th, 1985, by Mr. Indovina, apparently acting through the respondent Metro Investment Corporation, filed a successor application under section 63, together with the present complaint, against Metro Investment Corporation. That successor application was heard before another panel of the Board on April 4, 1985, and its decision will be referred to *infra*. Of initial significance, however, is the opening paragraph of the Reply filed by Mr. Indovina on behalf of Metro Investment Corporation, which stated:

Metro Investment Inc. is not a successor employer. Metro Investment Inc. purchased the shares of the Last Resort Hotel Inc. Metro Investment Inc. contends that the application is addressed improperly and should be addressed to the Last Resort Hotel Inc., who should be the respondent of the application.

11. Mr. Indovina's position, in other words, was that only a transfer of *shares* had taken place, and that the corporate ownership of the business continued to be in the hands of Last Resort Hotel Inc. The Board having just ruled in its December 21st decision that Last Resort Hotel Inc. was a successor employer, it is less than apparent to the Board how Mr. Indovina could take this position in his reply and at the same time take the position with the employees that he was not bound by the collective agreement which Mr. Doyle had entered into on behalf of Last Resort. The respondents, as noted, did not appear before the Board or adduce any evidence.

12. On the basis of all of the evidence before the Board, as well as the reverse onus provisions of section 89(5) of the Act, the Board finds that the operators of the Tavern engaged

in a massive repudiation of the complainant and of the employees' lawful rights under their collective agreement, in contravention of section 64 of the *Labour Relations Act*. The Board also finds, again in the absence of any countervailing explanation from Mr. Indovina, that his termination of Donna Sheppard was, contrary to section 66(a) of the Act, influenced at least in part by his annoyance over her insistence on retaining her rights, and on pursuing her rights, established under the January 15th collective agreement. It is not unreasonable to conclude, in fact, given the timing of events, that Mr. Indovina's ouster of John Doyle himself was motivated by the news that Mr. Doyle had signed a collective agreement with the Union, and that *all* of Mr. Indovina's subsequent repudiation of the Union and the rights of its members was similarly influenced by Mr. Indovina's strong anti-Union attitude. Given the lack, once again, of any evidence from Mr. Indovina as to the reasons for his actions, the Board further finds that Mr. Indovina's refusal to deal with the Union on the rights of its members upon the Tavern's closing was also a product of his anti-Union attitude, and, in the particular circumstances here, a violation of sections 64 and 66.

13. The above violations of the Act having been found, it remains to consider against whom the remedy in this case ought to run. Firstly, regard must be had to the decision of the other panel of the Board in the successorship application, Board File No. 3028-84-R. That decision was released May 14, 1985, and found, from a corporate point of view, that Last Resort Hotel Inc. did in fact continue to be the owner of the business. Accordingly, the Board finds that the remedy herein properly runs against Last Resort Hotel Inc.

14. Beyond that, however, the complainant has argued that this case involves the kind of extraordinary circumstances which the Board found in *Sunnylea Foods*, [1981] OLRB Rep. Nov. 1640, appropriately gives rise to personal liability under sections 64 and 66 of the Act. The Board ruled orally at the hearing that, in light of the complainant's submissions and allegations in this case, it would continue Anthony Indovina personally as a respondent in the proceedings, and, as in *Daynes Health Care Limited*, [1985] OLRB Rep. Mar. 387, it would be prepared to entertain submissions on the issue of personal liability at a subsequent stage in the proceedings, if that becomes necessary.

15. The evidence establishes that Donna Sheppard lost 3 1/2 weeks pay, at the union rate of \$6.86 per hour, plus average tips in the amount of \$200 per week, for a total claim of \$1,504.34. Against this amount Ms. Sheppard has received an advance of \$100.00. She is, however, also owed vacation pay of \$318.00. Thus her total claim is \$1,722.44.

16. The evidence establishes that Linda Lavalley was paid 80 cents under the Union rate for 72 1/2 hours, for a make-up claim of \$58.00. She is also owed full pay at the Union rate of \$4.80 an hour for 49 hours, being \$235.20, and vacation pay in the amount of \$160.00, for a total claim of \$393.20.

17. And finally, the evidence establishes that Anny Cieslak is owed, on the basis of a shortfall in the Union rate of 80 cents per hour for 13 1/2 hours spent as a waitress, and of \$2.36 an hour for 98 hours spent tending bar, the amount of \$242.08. In addition, Ms. Cieslak is owed full pay for 38 1/2 hours worked as a bartender (at the Union rate of \$6.80 an hour), or \$264.11, and vacation pay in the amount of \$193.60, for a total claim of \$699.79.

18. Having regard to the foregoing, the respondents are directed to deal with the complainant on all matters arising out of the complainant's collective agreement and the

cessation of employment of the complainant's members thereunder, and the respondent Last Resort Hotel Inc. is directed to pay to the complainant forthwith on its members' behalf:

- a) on behalf of Donna Sheppard, the amount of \$1,722.34;
- b) on behalf of Linda Lavalley, the amount of \$393.20; and
- c) on behalf of Anny Cieslak, the amount of \$699.79.

19. The Board will remain seized of this matter, in accordance with paragraph 14 above, until such time as the above orders have been complied with.

2549-84-U The Ontario Public Service Employees Union, Complainant, v. Fanshawe College of Applied Arts and Technology, Respondent

Colleges Collective Bargaining Act – Interference in Trade Unions – Unfair Labour Practice – Striking teachers legislated back to work – Reassignment of academic duties made unilaterally – Collective agreement nor legislation requiring consultation – Re-assignment achieving intent of legislation – No breach

BEFORE: *Paula Knopf*, Vice-Chairman and Board Members *R. Wilson* and *W. H. Wightman*.

APPEARANCES: *Ian Roland* and *Susan Bazilli* for the complainant; *Brenda Bowlby*, *G. Bissett* and *P. Myers* for the respondent.

DECISION OF THE BOARD; May 30, 1985

1. This is an application under sections 65 and 75 of the *Colleges Collective Bargaining Act*. In this case, the complainant is seeking the following relief:

- (1) A declaration that the respondent has violated the *Colleges Collective Bargaining Act*.
- (2) A direction that the respondent cease and desist from further violations of the Act.
- (3) A direction that the respondent pay to any affected employees all monies, premiums and benefits owing with interest as a result of the respondent's violation of the Act.
- (4) Such other relief as may be or become appropriate, fair or equitable.

2. The background to this case is that in the fall of 1984, the academic staff of the Ontario Council of Regents for Colleges of Applied Arts and Technology in the province held a 17 day strike. The strike was ended by the enactment of an *Act Respecting a Labour Dispute between the Ontario Public Service Employees Union and the Ontario Council of Regents for Colleges of Applied Arts and Technology and Boards of Governors of Colleges of Applied Arts and Technology* (hereinafter referred to as *Bill 130*). Bill 130 legislated the academic staff back to work. The issues that arise in this case stem from the assignment of work to the academic staff at Fanshawe College after they were returned to work.

3. At the outset of the hearing, counsel for the respondent asked the Board to exercise its discretion under section 71 of the Rules of Practice and Procedure to dismiss the complainant's case on the basis that it did not disclose a *prima facie* case. Further, it was submitted that the issue before this Board is *res judicata* in that it was dealt with earlier by the High Court of Ontario on February 22, 1985 by Mr. Justice Maloney. After hearing argument from both parties regarding the preliminary objection, the Board issued an oral ruling to the parties with the following reasons.

4. The basis of the union's case is set out in its complaint and by way of a letter outlining the particulars:

1. The Complainant and grievors were dealt with contrary to Sections 65 and 75 of the *College Collective Bargaining Act* (CCBA) when:
 - a. On November 12, 1984 the college imposed a penalty on employees for exercising their right to strike by assigning catch-up work without mutual consent and/or remuneration, thereby changing their working conditions which change came about entirely as a result of the strike.
 - b. The Respondent failed to recognize and refused to treat these employees in accordance with Sections 65 and 75 of the *College Collective Bargaining Act*.
 - c. The Complainant states that the fact is that the Respondent's actions are designed to or have the result of impeding and frustrating the Applicant bargaining rights and working conditions of the bargaining unit employees of Fanshawe College as represented by Local 110 of the Ontario Public Service Employees Union.

Ms. Brenda S. Bowlby,
Hicks, Morley, Hamilton, Stewart, Storie
Barristers & Solicitors,
Suite 1201, Box 371
Toronto-Dominion Centre,
TORONTO, Ontario.
M5K 1K8

Dear Ms. Bowlby:

RE: Ontario Public Service
Employees Union
and Fanshawe College —
Unfair Labour Act Charges

This letter is to confirm the information I have provided to you in our telephone conversation of January 30, 1985. In addition to the facts set out in the complaint filed with the Ontario Labour Relations Board, the applicant intends to rely upon the following additional facts:

1. The Ministry of Colleges and Universities convened a meeting of the Presidents of the Community Colleges in Ontario (including Fanshawe College) on or about November 15, 1984, and it was agreed to deal with challenges based upon the 'mutual consent' portions of clause 2(1)(b) of Bill 130 in a common way.
Subsequently by memorandum dated December 12, 1984 (a copy of which is enclosed) to the Presidents and Directors of Personnel of the Colleges, the Ministry instructed the Colleges how to respond to grievances involving the mutual consent provision of Bill 130.
2. By joint statement of the Ministry of Colleges and Universities and the Community Colleges dated November 21, 1984 (a copy of which is enclosed) the Colleges (including Fanshawe College) and the Ministry announced an agreed upon common application of S. 2(1)(b) of the Colleges of Applied Arts and Technology Labour Dispute Settlement Act, 1984, and purported to rationalize this approach by stating it must be recognized that it would be a misappropriation of public funds for a teacher to receive more than one days pay for one days work.
3. Jacqueline Robarts, President of Niagara College told a College Committee meeting on November 23, 1984 called to discuss the assignment by mutual consent of make-up work that she was awaiting instructions from the Ministry and that her hands were tied. When it was suggested that there be additional pay or time-off for performing make-up work, Ms. Robarts replied You've had your strike.
4. Jacqueline Robarts, President of Niagara College, stated, as reported in The St. Catharines Standard on November 28, 1984, that she realized that teachers will have to work harder to make up the lost time, but that's one of the penalties you pay for having a strike. In addition, she said that its [sic] true (the teachers' free) time is being infringed upon but that's one of the penalties you pay for having a strike. The bottom line is that they're trying to make up for the money they lost during the strike. Show me any company or business where people make up for the money they lost during a strike.
5. On or about November 14, 1984, Mr. Harley E. Smith, Benefit Policy Officer, Staff Relations—Benefit Section, Ministry of Colleges and Universities discussed a proposal made on behalf of the members of the academic bargaining unit whereby the current pension plan be amended to permit the members to pay contributions into the plan, so that members not lose future benefits as a result of the strike period in which no contributions were made. In response to this request, Mr. Smith expressed his opinion and that of the Council of Regents to OPSEU representatives including Georgina Hancock, that because the academic bargaining unit members had gone on strike, they should pay a price by way of loss of pension benefits in the future. Mr. Smith said When people go on strike they have to suffer or words to that effect. When asked if the Council intended to penalize those members who will retire in the next five years because they've been on strike, he replied If that is the effect of rejecting the amendment (to the pension) then that is OK, or words to that effect.

Yours very truly,

GOWLING & HENDERSON

Ian J. Roland.

5. The union's case alleges that the assignment of work to the academic staff after the

strike amounts to violations of section 65 and 75 of the Act. It is alleged in particular that section 75(1) was breached when the college failed to involve the union in assigning the work. Thus it is said that the union's representational rights were violated because there was no consultation with the union. To support this proposition, the union relies on the *obiter dicta* found in the decision of *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sep. 1411 at 1434. While the union acknowledges that its members could not decline to do the assigned work regardless of the lack of consultation, it is submitted that the denial of the right to consult amounts to a breach of section 75(1) of the Act.

6. Secondly, the union submits that section 75(2)(a) has been violated because the teachers have been discriminated against for exercising their right to strike. It was argued that the work that was assigned to the teachers after the strike amounts to them having to work the equivalent of seventeen more teaching days without remuneration and this amounts to discriminatory conduct towards them as a result of their participation in the strike. Finally, it is argued that section 75(2)(c) has been violated because Fanshawe College, the Council of Regents of Colleges of Applied Arts and Technology and the Ministry of Education has conspired to compel teachers from refraining from exercising their right to strike under the Act by penalizing them for exercising that right.

7. The union advised us that in order to support its claim, it would rely upon the facts set out above as well as a letter of March 22, 1985. This information sets out the facts of the strike, the circumstances of the work assignment after the strike and the union's perception of the Ministry and the Council of Regents of the Colleges of Applied Arts and Technology's position regarding the work assignments after the strike.

8. It is clear to the Board that this case raises a matter of serious concern regarding working conditions and representational rights for the union and Fanshawe College. Indeed, it is apparent that the issues raised in this case have a profound importance upon these rights across the province in this sector. Because of this, the Board is exceedingly cautious about dealing with such an issue on a summary basis by way of a preliminary motion to dismiss on the suggestion that there is no *prima facie* case established by the union. Thus, in assessing this issue, we are assuming for the purposes of this motion, that all the facts put to us by the union are true. The test that the Board is applying is found in the often cited decision of *Caravelle Foods*, [1983] OLRB Rep. June 875 at paragraph 13:

The words *prima facie* in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render reasonable or arguable a conclusion that the Act has been breached.

Therefore, in this case, we must determine whether the applicant union's case, at its best, renders reasonable or arguable a conclusion that the Act has been breached by the College.

9. To a great extent, this case has been resolved by the decision of the Supreme Court of Ontario alluded to above. Two members of the applicant union on their own behalf and on behalf of the other members of the union brought an application against Fanshawe College under Rule 14.05(3)(d) and (h) of the new Rules of Practice and Procedure seeking, *inter alia*, the Court's guidance with regards to the interpretation of section 2(1)(b) of *Bill 130*. In an unreported oral decision issued on February 22, 1985, Mr. Justice Maloney dealt with the interpretation of section 2(1)(b) of *Bill 130*. Section 2(1)(b) provides:

Upon coming into force of this Act,

• • •

- (b) every employee shall report for work and shall perform the duties assigned by the employer including duties assigned by mutual consent in order to afford students the opportunity to complete courses of study affected by the strike.

Mr. Justice Maloney decided that, despite the lack of consent that was sought or obtained from the union regarding the work assignment after the strike, the assignment was lawful. He found that neither *Bill 130* nor the collective agreement required the teachers' consent to be or obtained to make the work assignments that were placed in effect at Fanshawe College after the strike.

10. We agree with the union that the issue before this Board is broader than that which was before the Supreme Court of Ontario. But the resolution of that narrow issue by the Court has an important impact on the union's position before this Board.

11. This can be seen when we deal with the union's allegations individually. The union has argued that section 75(1) has been violated in that its representation rights were denied when the union was not consulted. Section 75(1) provides:

No person who is acting on behalf of the Council or an employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the Council or an employer or any person acting on behalf of the Council or an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

However, Mr. Justice Maloney ruled that there was no requirement to obtain an agreement from the teachers regarding the assignment of work in this college:

The Act, which brought an end to the strike, continues in force the pre-existing collective agreement under which the college clearly has the right to assign duties, subject to the proviso in Article 4 thereof that 'no teacher shall be assigned to teaching hours in excess of the maximum period . . . provided for . . . except by voluntary agreement between the teachers and the college . . .' That maximum has not been exceeded in this case so that the agreement of the teacher (or any of them) is not required in this case. Accordingly, the words 'mutual consent' in section 2(1)(b) in no way limits the authority of the college to effect the impugned rearrangement of duties. In any event the word 'including' does not restrict but rather adds to the words preceding it. . . The teachers have not been assigned work on weekends or holidays. In the net result, the rescheduling has not imposed any additional work in days upon the teachers but has given effect to the very purpose of the Act - i.e. to make up to the students the lost teaching time so that they could complete their course of study.

12. In order for this Board to find that there is an arguable case and that section 75(1) has been breached, the Board will have to find that a duty to consult with the union under these circumstances exists. However, the Supreme Court has made it clear that the duty to consult only arises where the maximum teaching hours provided for already under the collective agreement are exceeded. However, in the facts of this complaint, there is no suggestion that the maximum number of teaching hours has been exceeded. Further, *Bill 130* itself does not set out a duty to consult. Thus, neither the collective agreement nor *Bill 130*

creates a duty upon the College to consult with the union in these circumstances. The *Consolidated Bathurst Packaging Ltd.* case, *supra*, which was relied upon by the union, deals with the duty to consult with the union in very specified circumstances and discusses such duty by *obiter dicta*. However, the situation which that case discusses is so completely different and without analogy to the situation before this Board that it can have no application in this case. Thus, we cannot conclude that the duty to consult is created in these circumstances as a result of the decision in *Consolidated Bathurst Packaging Ltd.*, *supra*.

13. The College's failure to consult with the Union in this situation after the strike and making such unpopular work assignments may well have been ill advised. Further, it can be seen that failure to consult has been unwise in a labour relations sense. However, on the basis of the facts alleged by the union, and in the face of the Supreme Court's decision, we must conclude that the College's failure to consult with the Union cannot reasonably or arguably be said to have established a breach of the Union's right to represent the employees under section 75(1) of the Act.

14. We turn now to the question of whether the College's actions can be said to amount to discriminatory treatment of the teachers as a result of the strike and thus be considered to be a violation of section 75(2)(a) of the Act. Section 75(2)(a) reads as follows:

75.-(2) The Council, an employer or any person acting on behalf of an employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization.

Counsel for both parties dwelt on the question of whether intent was required to establish a breach of this section. However, we feel that this interesting issue need not be determined in this case. Instead, what is important is that *Bill 130* required that the academic staff return to work. The intent of *Bill 130*, as stated by Mr. Justice Maloney, was to make up to the students the lost teaching time so that they could complete their course of study. The result of the assignments after the strike was to effect that stated intent of *Bill 130*. However, one must still ask whether the assignments can amount to discrimination of the teachers. The teachers argue that the rearrangement of their assignments required much more from them. It is clear that the teachers may have had to work a fuller day in the remaining academic year. However, there is no allegation that the teachers will be required to work a longer academic year or any more days as a result of the reassignment. Instead, what happened is that their academic duties were reassigned in certain ways. For example, the days which had been designated as tutorial days or examination days were changed to become classroom instructional days which would obviously require much more preparation time by the teachers. However, there is nothing in the collective agreement or in the relevant legislation that establishes that teachers had the right before the strike to be paid extra if the duties were reassigned during the academic year within the scope of Article 4 of the agreement. The facts that the union is relying upon only show that the work was reassigned during this academic year within the scope of Article 4. Thus, the teachers cannot show that they are not being paid for work which they would have been paid for prior to the strike.

15. Finally, the union argues that there has been a violation of section 75(2)(c) of the Act which states as follows:

75.-(2) The Council, an employer or any person acting on behalf of an employer shall not,

• • •

- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act.

Basically, the union submits that their members are being penalized to compel them to refrain from exercising their right to strike. The facts that the Union intended to assert to prove this were, as set out above, the statements made by officials in the Ministry and spokespersons from other colleges showing a conspiracy to exact a penalty from the teachers.

16. However, assuming the statements were admissible and that all the evidence the union wished to adduce to prove the conspiracy was admissible, we cannot see how a breach of section 75(2)(c) could be established by such evidence. Both counsel acknowledged that intention is a necessary requirement of a violation of section 75(2)(c). But the conduct and the statements that the union relies upon does not reveal anything other than that the College fulfilled its requirements under the statute to make up the lost time to the students. Thus no causal connection is established between any anti-union animus the College may have had and what the College actually did to comply with the statute. The pleadings of the union only reveal that the College did what it was required to do under the statute. While there may have been specific cases where it may be shown that the college may have had an anti-union animus in the way it exercised its discretion with regard to individuals and their personal schedules, that was not alleged or argued in this case. Therefore, on the basis of the pleadings before us, no breach of section 75(2)(c) can be made out.

17. It is a matter of regret and concern to this Board that the College did not engage in the consultative process with the union before the reassignment of academic duties was made. Perhaps, had this been done, these lengthy and divisive proceedings could have been avoided. It may well be that the union will want to pursue the matter further by way of asserting individual claims or arbitral rights before an arbitrator. However, even accepting every aspect of the union's case as being true, we are forced to conclude that the union's case cannot establish, on a reasonable or arguable basis, that the Act was breached as alleged. Thus, pursuant to section 71 of the Rules we have decided to dismiss this case without a hearing.

18. This decision confirms the reasons given orally to the parties at the hearing.

0173-85-R Graphic Communications International Union, Local 466, Applicant, v. **Guelph Paper Box Company Limited**, Respondent, v. Group of Employees, Objectors

Certification – Membership Evidence – Receipt portions of cards filed signed by person other than collector – Form 9 declarant misrepresenting that he actually collected – Membership evidence not given any weight due to misleading Form 9

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

APPEARANCES: *J. Elliott* for the applicant; *Brent Foreman* and *Tom Burri* for the respondent; *Malcolm Wilson* for the objectors.

DECISION OF THE BOARD; May 27, 1985

1. The name of the respondent is amended to read: Guelph Paper Box Company Limited.

2. This is an application for certification with respect to a bargaining unit in which 45 persons were employed by the respondent as of the application date. The applicant trade union filed combination applications for membership and receipts (which will be referred to as cards) signed by 36 of those persons. Three cards suffered from defects or difficulties apparent on their face. One of the cards did not indicate the payment of least \$1.00 in respect of initiation fees or monthly dues. As a result, that document did not constitute evidence of membership within the statutory definition in section 1(1)(l) of the *Labour Relations Act*. Having regard to the requirements of Rule 73 of the Board's Rules of Procedure, the defect was not one which could have been cured by oral evidence of payment: see *P.R.C. Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May 749. The problem with the two other cards concerned their dates: one was dated April 19, 1984 and another was dated April, 1985. Difficulties with dates can be cured by oral evidence: *Campbell Soup Company Limited*, [1966] OLRB Rep. Mar. 883; *P.R.C. Chemical Corporation of Canada Ltd.*, *supra*, at paras. 20-23. Jim Elliott, a business agent of the applicant, was its representative at the hearing. His signature appears on the receipt portion of each card filed by the applicant. He advised the Board and the parties that the apparently stale card had been signed on April 19, 1985, not 1984, and that the card dated April, 1985 had been signed on April 22, 1985. The other parties agreed that the Board could accept those allegations as fact without formal proof.

3. Accordingly, it at first appeared that the applicant could establish membership support sufficient to permit certification without a vote. As the Board had received a timely and numerically relevant statement of desire in opposition to representation by the applicant, the Board embarked on its customary inquiry into the origination and circulation of that statement of desire.

4. During the Board's examination of Malcolm Wilson, the originator and circulator of the statement of desire, Mr. Wilson testified that he had not met the applicant's business agent, Mr. Elliott, at any time before the hearing. Mr. Wilson was shown the card which he had signed and which bore Mr. Elliott's signature on the receipt portion. Mr. Wilson could

not remember whether the latter signature appeared on the card when he signed it, but was sure that he had never met Mr. Elliott. Mr. Elliott was also the trade union official who signed the Declaration Concerning Membership Documents in Form 9 which was filed by the applicant as required by section 6 of the Board's Rules of Procedure. Mr. Elliott said he did not dispute Mr. Wilson's testimony. He admitted that he had not been the collector of two of the cards filed by the applicant. He said the actual collector, a bargaining unit employee, had not signed the receipt portion of those two cards. Elliott claimed he had made the appropriate inquiries of the employee collector, and on the basis of those inquiries had signed his own name on the receipt portion of the two cards in question.

5. The Board drew to Mr. Elliott's attention the provisions of paragraph 3 of the Form 9 declaration he had signed:

3. (Where the documentary evidence consists in part of receipt or other acknowledgements of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that *the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees* and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, **EXCEPT IN THE FOLLOWING INSTANCES:**

(emphasis added)

No exceptions are noted in the space which follows this paragraph. Elliott said he handled the cards the way he did because he did not know what else to do.

6. By submitting the membership documents and declaration concerning membership documents in the form he did, Mr. Elliott represented to the Board that he was the person who had actually collected the monies paid on account of dues or initiation fees by the person who had signed the membership documents. Elliott made that representation knowing that it was false with respect to two of the membership documents.

7. The absence of a collector's signature on the receipt portion of a membership document was not an uncurable defect: see, *Leon's Furniture Limited*, [1977] OLRB Rep. Jan. 25 and *Maple Leaf Mills Limited*, [1984] OLRB Rep. Oct. 1474. The concern prompted by the revelations in this case is not with the original defect, but with the fact that the applicant, through Elliott, chose to deal with the problem in a manner which it knew or ought to have known would mislead the Board. The significance of the Form 9 Declaration, and the importance of complete disclosure by the declarant, were discussed in *Zehrs Markets Limited*, [1972] OLRB June 635 at paragraphs 4 and 5:

4. There are a number of cases before this Board dealing with Form 8 [now Form 9]. Those cases indicate that the Board has exacted very stringent standards from applicants who submit membership evidence. These stringent requirements are necessary because the membership evidence or records of trade unions relating to membership fall within the secrecy requirements of section 100 [now section 111] of the *Labour Relations Act*. Other parties to a certification proceeding do not have the opportunity to examine the membership evidence nor in the usual case do the parties have the opportunity to cross-examine witnesses with respect to the membership evidence. It is in those circumstances that the Board approaches its statutory responsibility under section 7 of the Act and accordingly is extremely vigilant in ensuring the

propriety of membership evidence. Since the Board in turn must rely on the evidence of membership tendered by the applicant trade union the Board has exacted strict requirements from applicant trade unions with respect to that membership evidence and particularly with the declaration concerning membership documents (Form 8).

5. The Declaration, Form 8, goes to the very root of the membership evidence submitted by the applicant. *Canadian Union of Operating Engineers. v. The Stanley Steel Company Limited v. United Steelworkers of America* [1972] OLRB Rep. 181; and the cases before this Board have indicated that there must be a compliance with the requirements of Form 8 and complete disclosure must be made. See e.g. *Stanley Steel Company Limited, supra*; *United Steelworkers of America v. National Steel Car Corporation Limited* [1963] OLRB Rep. 448; *Retail, Wholesale and Department Store Union, AFL-CIO:CLC v. Dominion Stores Limited* [1964] OLRB Rep. 447; *International Association of Machinists v. Essex Wire Corporation Limited v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, Affiliated with the I.B. of T.C.W. & H of A.* [1965] OLRB Rep. 490; and where compliance with the directions of Form 8 and the standards of accuracy and disclosure contained therein were not met the Board has invariably found that there is not sufficiently reliable evidence concerning membership documents.

The Board's strict standard, and the jurisprudence which has repeatedly outlined the consequences of failure to comply with that standard, are well known in the labour relations community. Mr. Elliott acknowledged awareness of them.

8. In the circumstances, because it is accompanied by a misleading Form 9 Declaration, the Board is not prepared to give any weight to the membership evidence filed by the applicant: see *Hollard River Gardens Company Limited*, [1963] OLRB Rep. Oct. 364.

9. This application is dismissed.

2105-84-R Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, Applicants, v. **Hespeler Concrete Floors Ltd.** Puslinch Concrete Floors Limited, Respondents

Related Employer – Sale of Business – Principals of employers evading service of summons with respect to Board proceedings – Board relying essentially on evidence adduced by applicant union – Making finding of related employers

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *C. A. Ballentine* and *A. Grant*.

APPEARANCES: *S.B.D. Wahl*, *E. Bairos* and *K. Rimmington* for the applicants; no one appearing for the respondents.

DECISION OF THE BOARD; May 14, 1985

1. The name of one of the respondents is amended to read: Puslinch Concrete Floors Limited.

2. The applicants have applied to the Board for relief under sections 63 and 1(4) of the *Labour Relations Act* with respect to the bargaining rights of the applicants. The applicants have alleged that a sale of a business by Hespeler Concrete Floors Ltd. (Hespeler) to Puslinch Concrete Floors Limited (Puslinch) has occurred and has allegedly taken place on a date unknown, and/or there has been the operation of associated or related businesses or activities under common direction or control by Hespeler and Puslinch.

3. In its reply, Hespeler adopted the position that it had operated at a loss for the last several years and had decided between going bankrupt or closing its business operations when it ceased business operations in the summer of 1984. Hespeler also stated that it had no assets and was still indebted to the Ontario Workmen's Compensation Board and Ministry of Revenue for arrears in payments and has a contingent liability owing to Revenue Canada for income taxes for which Axel Tromm might be personally liable. It was also the position of Hespeler that all of its employees were provided with notice of termination, paid severance pay and accrued holiday pay at the time their employment was terminated. Hespeler adopted the position that the applicants were not entitled to relief under either section 1(4) or section 63.

4. In its reply, Puslinch stated that it was not under the same control and direction of Hespeler and that Puslinch had 100 issued common shares, all of which were owned by the president of Puslinch, Elizabeth McKellar. The reply further stated that there were no arrangements or trust by which any third person has or was able to maintain any proprietary rights to the issued shares or by which any person had a right or option to have shares in Puslinch issued to them. Puslinch, in its reply, further stated that Elizabeth McKellar was the sole director of Puslinch, having been elected a director on August 15, 1984, and that she is the sole officer of Puslinch, holding the offices of president, vice-president and secretary. Puslinch further stated that Ms. McKellar has sole signing authority for cheques and borrowings from Puslinch's sole banker, the Bank of Nova Scotia, and that she devotes herself full-time to the duties of managing and operating Puslinch and operates her office at the head office of Puslinch. The reply further stated that Ms. McKellar is not related by birth or

marriage to any officer, director or shareholder of Hespeler, and that Puslinch has entered into a lease with Irene Poechman for a four-year term for the rental of its warehouse premises. Puslinch also stated that it leased its vehicles, and it did not acquire any equipment from Hespeler. It was also the position of Puslinch that it has not entered into an agreement for the purchase of all or substantially all of the assets of Hespeler, and had not entered into any agreement for the purchase of shares in Hespeler.

5. The reply from Puslinch also stated that Axel Tromm is an hourly-rated employee of Puslinch and has no right to any further amounts by way of bonus, dividends, or otherwise, and that other employees of Puslinch are hired from time to time as required from the available non-union labour pool in Cambridge, or in areas where Puslinch is carrying on business. It was the position of Puslinch that the applicants are not entitled to any relief under sections 1(4) or 63.

6. The applicants endeavoured to serve subpoenas *duces tecum* on Axel Tromm, Elizabeth McKellar and Peter R. Sturdy, Q.C. For reasons which will become apparent, subsequently, the subpoenas were not served on Mr. Tromm or Ms. McKellar. However, Mr. Sturdy was served with the subpoena *duces tecum* and appeared before the Board at the hearing on January 30, 1985.

7. At the commencement of the hearing, Mr. Sturdy put forward a claim of solicitor/client privilege with respect to his being required to give evidence before the Board. Mr. Sturdy made it quite clear that he was not appearing, nor, indeed, was any member of his firm appearing in the capacity of representing either of the respondents. By way of clarification, Mr. Sturdy informed the Board that he is not a director of either corporation, and that he has not done any corporate work for the respondents for the past two years. He has not acted for Puslinch recently, but has acted for Hespeler as a solicitor and client up to approximately two years ago, and he has ceased doing their corporate work. He worked for Mr. Tromm in the sixties on a personal matter, and in 1971, when Mr. Tromm was incorporated, Mr. Sturdy performed the work of incorporation. He was a provisional director for Hespeler for three days in 1971.

8. On the agreement of Mr. Wahl on behalf of the applicants and Mr. Sturdy, the following facts were placed before the Board. Mr. Sturdy does not have documents in his care and control. They are in the custody of the firm and consist of some minute books. He is a partner of the firm. Mr. Sturdy conducted an interview prior to the incorporation of Hespeler, only in the sense that he was named as a director. His partner, Mr. Lennox, did the incorporation work and he was there to sign the papers. On that occasion, those present were Mr. Lennox, Mr. Tromm and Ms. McKellar. Mr. Tromm is the president of Hespeler and Ms. McKellar is the president of Puslinch. Mr. Tromm, the president of Hespeler, was present at the time that all the documents relating to the incorporation of Puslinch were signed. Mr. Sturdy did not handle any matters with respect to any discussions in contemplation of litigation and knows nothing of the particulars. Mr. Sturdy is not a director and, therefore, has no evidence or documentation. As a solicitor of the firm retained, he had no consent to divulge information, and as a solicitor, his correspondence on an individual basis was claimed as privileged. Conversations with respect to the corporations would have taken place with Mr. Lennox and not with Mr. Sturdy. Mr. Wahl agreed with Mr. Sturdy's position in view of his activity and he did not choose to challenge the extent of his privilege. At this point, Mr. Sturdy

was released from the hearing and took no further part in the hearing of the application before the Board.

9. Mr. Wahl pointed out that this matter was previously scheduled for hearing on December 20, 1984, and that on that occasion Mr. Tromm had contacted Mr. Strang, another solicitor, and had requested and had received an adjournment with respect to both of the respondents.

10. Keith Rimmington gave evidence that he is the secretary-treasurer and a business representative of the Labourers' International Union of North America, Local 1081 (Local 1081). Mr. Rimmington stated that the Board issued a certificate to Labourers' International Union of North America, Local 506 with respect to all construction labourers in the employ of Hespeler in the Board's geographic area #8, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman on December 5, 1978. He caused his solicitors to make corporate searches of Hespeler. On May 7, 1971, Hespeler was incorporated and Axel Tromm is listed in the annual information return as the sole director and sole officer of Hespeler. He informed the Board that Local 1081 has had problems with Hespeler and with Mr. Tromm with respect to the Labourers' provincial collective agreement. In 1982, a grievance was filed by Local 1081 against Hespeler. In that grievance, a settlement was agreed to wherein Hespeler agreed that it was bound by the provincial collective agreement between the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council, effective from June 1, 1980, until April 30, 1982. In that settlement, Hespeler in acknowledging that it was bound by the collective agreement, also acknowledged that it had violated certain articles, agreed to adhere to all terms and conditions in the provincial collective agreement with respect to cement finishers and agreed to pay the sum of five hundred dollars with respect to damages for the breach of the collective agreement. (See *Hespeler Concrete Floors Ltd.* – Board File 0059-82-M, decision dated April 22, 1982).

11. Thereafter, Hespeler filed the appropriate employer's contribution reports for about six months after the settlement and decision of the Board in April of 1982. Reports were made for all of 1983, and for January and February of 1984. However, the returns for 1983 are nil returns and show no hours worked, with the exception of June when a total of 112 man-hours of work was reported and July when a total of 98 man-hours of work was reported. Hespeler paid monthly dues for three employees for this period. The three employees who are listed thereon were not on Local 1081's out-of-work list. One of the members on the return is Mr. Tromm. Since that time Mr. Tromm has dropped his membership in Local 1081.

12. In February of 1984, a termination application was put forward by Mr. Tromm on behalf of Hespeler with respect to the bargaining rights of Local 1081 for employees of Hespeler. In a decision dated February 28, 1984, the Board dismissed this application to terminate the bargaining rights of Local 1081, on the grounds that the employer had participated in the application and that the section under which the application was made was a section which was clearly not open to employers. (See Board File No. 2712-83-R).

13. The membership files of Local 1081 show the payment of union dues throughout 1983 until at least November of that year with respect to James Brown, Norman Jarvis and Axel Tromm. The payment of union dues was accompanied by check-off forms.

14. In July of 1984, Labourers' International Union of North America, Ontario Provincial District Council filed a grievance with respect to Hespeler and Mr. Tromm. Labourers' International Union of North America, Ontario Provincial District Council alleged that Hespeler was bound by and had violated the agreements binding on Hespeler between the Labourers' designated employer and employee bargaining agencies in that it had failed or refused to remit working dues and benefit contributions for hours worked by labourers on its various projects on or after December 1, 1983. In a decision dated October 12, 1984, the Board again declared that Hespeler was bound by the provincial collective agreement between the employer bargaining agency - Labourers and the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council. The Board made certain directions in that decision with respect to the failure of Hespeler to comply with the terms of the provincial collective agreement. (See Board File No. 1232-84-M, decision dated October 12, 1984).

15. Mr. Rimmington also caused the solicitors for Local 1081 to search the corporate records of Puslinch under the terms of the *Corporation Information Act*. Form 1 thereunder dated August 15, 1984 shows that Puslinch was incorporated on August 15, 1984. This current form also shows that Elizabeth McKellar of 64 Christopher Drive, Cambridge, was on August 15, 1984, the sole director of Puslinch and was also as the president, secretary and vice-president of Puslinch, its sole officer. This form was filed on October 12, 1984, with the company's branch of the Ministry of Consumer and Commercial Relations. Ms. McKellar was or still is Mr. Tromm's secretary and she used to do the bookkeeping for Hespeler. She worked from 30 Sheldon Drive in Cambridge and Mr. Tromm used to have an office there with a service bay at the back in an industrial building. Afterwards she worked from Mr. Tromm's recreation room in his home at R. R. #2, Puslinch, where she does the bookkeeping and time sheets for him. When telephoning Mr. Tromm's home, Mr. Rimmington has been informed on several occasions that she was not in at the present time. On January 23, 1985, at approximately 2:00 p.m., Mr. Rimmington visited Mr. Tromm's home and when he arrived there he noticed a black Mercury Capri parked in the drive in front of the garage. He went to the door and knocked at the door. After several minutes a girl and a young man came to the door. He asked the girl if he could speak to Ms. McKellar. The young girl informed him that she was not home, and she did not know when Ms. McKellar would be returning. Mr. Rimmington identified the girl as Mr. Tromm's daughter, Nancy. At around 4:00 p.m. on the same day, he went to 64 Christopher Drive in Cambridge where he noticed parked outside the same car he had seen outside Mr. Tromm's home. He also noticed Mr. Tromm's daughter Nancy and the same young man. Mr. Rimmington parked on the other side of the street and observed the premises for about ten minutes. He saw Nancy get out of the car and go around to the back door of 64 Christopher Drive. The young man drove the black Mercury Capri away and Mr. Rimmington went to the front door and knocked on the front door intermittently for twenty minutes. No one answered the door. On both occasions he had a summons to serve on Ms. McKellar.

16. Mr. Rimmington gave evidence that Puslinch is presently located on Pinebush Road in Cambridge and that Hespeler works out of this location. Mr. Rimmington spoke to an employee of Mr. Tromm or Hespeler who told him that Mr. Tromm had a ten-year lease at this location with the person who owned the property as of two years ago when the lease was negotiated. Mr. Rimmington has seen vehicles at that location. For example, on October 16, 1984, he saw a blue pick-up truck, licence number KD1911. He followed the vehicle and caused a licence search to be done. The truck was leased by Axel Tromm operating as

Hespeler. On that same morning another pick-up truck, licence number KT3556, also left the premises. The truck was leased by Hespeler. Both vehicles were kept in the service bay at night. Some months ago one of the members of Local 1081 inquired about Mr. Tromm and was told by Mr. Rimmington that the union was having its problems. The member said that he was now working for Puslinch where Mr. Tromm was the superintendent. On October 17, 1984, Mr. Rimmington saw a Ford LTD vehicle licence number TTT968 at the Pinebush Road premises. He observed it leaving the premises with four men inside the car. He caused a licence plate search to be done, and discovered that the lessee was Mr. Tromm, operating as Hespeler.

17. More recently, he has seen the Ford LTD on January 9, 1985, at a construction project in Guelph. Ariss Construction was the general contractor. Local Union 1081 or the Labourers' District Council have bargaining rights for Ariss Construction under the provincial collective agreement. On January 9, 1985, he also saw a vehicle licenced KT3556 with the blue Ford pick-up on that job. Concrete flooring at the project was being performed and Mr. Rimmington asked the superintendent of the project who was doing the concrete floors and he was told that Axel Tromm was doing the work. When Mr. Rimmington tried to inquire further, the superintendent refused to give him any further information. There was something about the licence plate on the Ford LTD, licence number XDX073, which caused Mr. Rimmington to believe that it was exactly the same car as the car which had displayed the licence number TTT968. He caused a further licence search to be done and discovered that the registered owner was Puslinch. In other words, the vehicle bearing licence number TTT968 and the vehicle licence number XDX073 were the same vehicle and had been transferred to Puslinch. On other occasions Mr. Rimmington followed the trucks previously referred to. On the morning of October 24, 1984, he followed the Ford LTD licence TTT968 from Pinebush Road. He observed four men inside the car and followed the car to another construction project at the University of Guelph. The general contractor on that job was X.D.G., which is one of the signatory contractors to the provincial collective agreement. He went to the shack on the job, phoned the head office of X.D.G., spoke to a person there, and told him that there was a problem with respect to the cement finishing work on the project. The person he spoke to was one of the owners of X.D.G. and he promised to send over a representative of his company in order to try and resolve the problem. About thirty minutes later the superintendent called him back into the shack and said that one of the owners wanted to speak to him regarding the problem. The owner said that he did not know that Local Union 1081 was having problems with Mr. Tromm and told him that if Local Union 1081 did not interrupt the pour, he would pay damages to Local Union 1081 with respect to the violation of the provincial collective agreement. He also told Mr. Rimmington that Mr. Tromm never told him which company he was using to do the job under until he had been made aware of the company called Puslinch. Mr. Rimmington told him that Puslinch was operated as a non-union company by Mr. Tromm. The part-owner stated that he did all of his dealings as far as prices were concerned for the floors with Mr. Tromm, and then said the work could be done by Puslinch or Hespeler. The part-owner said that he would no longer use Mr. Tromm on a subsequent project that was planned. X.D.G. paid two hundred dollars to Local Union 1081 for the damages it sustained as a result of the work performed by Mr. Tromm.

18. On January 24, 1985, Mr. Rimmington and Ernest Bairos went to visit Mr. Tromm's home at R. R. #2, Puslinch and found no one there. On January 29, 1985, Mr. Rimmington again went to Mr. Tromm's home and his daughter Nancy came to the door. He asked to see Ms. McKellar and he was told she was not at home. He then went over to Ms. McKellar's

home at 64 Christopher Drive and knocked at the door. There was no sign of anyone at the house and there was no one in the garage. Mr. Rimmington has obtained the services of a sheriff's officer in the Judicial District of Waterloo in order to serve subpoenas on Mr. Tromm and Ms. McKellar. He made contact with the sheriff January 25, 1985, and received the report from the sheriff's officer in response to his attempts to serve the subpoenas on Mr. Tromm and Ms. McKellar. The officer visited the home of Ms. McKellar at 64 Christopher Drive in Cambridge on January 25, 1985, and there was no answer at the door. He made a trip there on the following day and no one would answer the door, although he saw someone looking out from between the curtains. He then went home and phoned this residence and a man answered and stated that Ms. McKellar was sleeping and he couldn't wake her up. He attended once more at around 3:30 p.m. on January 26, 1985, and once more someone was in the house in the view of the officer but would not answer the door. He made one more journey on January 28, 1985, to the home of Ms. McKellar shortly after 9:00 p.m., and although the house was well lit no one would answer his knocking at the door. The officer also made visits to the home of Mr. Tromm at R. R. #2, Puslinch. He made a trip there on Saturday, January 26, 1985, and received no answer. He left his card, but there was no response. He made another visit there on January 28, 1985, at about 9:00 p.m. and there was no one at home. He also tried phoning Mr. Tromm's home at 7:00 a.m. on the 28th and the 29th of January, 1985, but received no answer.

19. Ernest Bairos, the business manager of Local Union 1081, gave evidence before the Board. He has been involved in an investigation of Hespeler and Puslinch. On October 16, 1984, Mr. Bairos and Mr. Rimmington sat down and went over the Hespeler situation. Mr. Rimmington was assigned to the job and on October 23, the two men discussed the matter and decided on October 24 to get some more information. On that date, the two men met at 6:30 a.m. at the Pinebush Road yard and followed the truck bearing licence number KD1911. Mr. Bairos followed Hespeler's truck along Highways 401 and 52 to the Milton Road. He turned on to the Airport Road. At that point it seemed to Mr. Bairos that the people in the truck suspected they were being followed and they tried successfully by quick maneuvers to lose Mr. Bairos. He identified the names of the two men in the vehicle as Cam Brown and Rick Harting. The latter is a member of Local 1081, the former is not. Mr. Bairos then returned home and prepared this grievance.

20. On November 11, after lengthy discussions with Mr. Rimmington, Mr. Bairos decided to act as a contractor, picked up the telephone and dialed the number for Hespeler. The telephone was answered by Ms. McKellar. He told her that he was a contractor looking for tenders. She told him to speak to Mr. Tromm. When he asked for the address, she gave him the address of R. R. #2, Puslinch. She said there was always time for a job. She referred him to Mr. Tromm at his home address and gave him the directions on how to get there. She said she would be there, but said there was no point in his delivering the blueprints because he would have to speak to Mr. Tromm and added that he was working. About ten minutes later, Mr. Bairos knew they had to be at 64 Christopher Drive, so he went to see and a young girl came to the door and said that Ms. McKellar was at work and that she was the secretary at Hespeler. He tried to serve summons on Tuesday, January 22, at about 7:00 p.m. He went to R. R. #2 in Puslinch and had no success because no one was there. He also went there the next day and tried to serve Mr. Tromm and Ms. McKellar with subpoenas. Again he had no success. On January 24, he decided to go during the day and went there with Mr. Rimmington. They were there at about 3:00 p.m. There were people home and there was a car in the garage. He knocked at the door and no one answered. The two men decided then

to give the subpoenas to the sheriff. Upon discovering that the sheriff's officer had been unsuccessful in serving subpoenas on Mr. Tromm and Ms. McKellar, Mr. Bairos and Mr. Rimmington decided once again on January 29 to try and serve them. Mr. Bairos went to Mr. Tromm's home at R.R. #2, Puslinch, and found the lights on at about 7:00 p.m. He looked through the window and saw grocery bags on the table and that half of the contents of the bag had been put away. There was a dog barking inside the home but no one would come to the door. He then went straight to 64 Christopher Drive at about 8:00 p.m., and was told that Ms. McKellar was at work. He identified himself and explained that he had a subpoena. The person who came to the door refused to accept the subpoena. A car that was parked in the driveway at 64 Christopher Drive was driven away shortly after Mr. Bairos had unsuccessfully tried to serve the subpoena.

21. The evidence before the Board indicates a design by Mr. Tromm and Ms. McKellar to evade service of subpoenas in connection with the hearing of this application. It is apparent from the number of grievances filed by and on behalf of the applicant that Mr. Tromm has not accepted the reality of a collective bargaining relationship with the applicant. Moreover, his unsuccessful attempt to improperly terminate the bargaining rights of Local 1081 with respect to Hespeler in February of 1984 was followed within six months by the incorporation of Puslinch. Mr. Tromm was present during the execution of the documents in connection with Puslinch. His secretary and bookkeeper Ms. McKellar is the sole director and officer of Puslinch. It is apparent, however, that Ms. McKellar does not engage in concrete flooring work and that an employee of Puslinch regards Mr. Tromm as his effective boss or superintendent.

22. The part-owner of X.D.G. believes that the concrete flooring at the University of Guelph could have been performed by Hespeler and Puslinch when he dealt with Mr. Tromm. While Ms. McKellar is said to be the sole shareholder of Puslinch, the Board was denied the opportunity to explore this fully because of the absence of any evidence by Mr. Tromm and Ms. McKellar. On the evidence before it, the Board is satisfied that Mr. Tromm is the actual and effective management of Hespeler and Puslinch. The Board also finds that in operating out of the same premises and performing the same line of work of concrete flooring there is an interrelationship of operations. Moreover, the transfer of a car from Hespeler to Puslinch and the use by Puslinch of trucks leased to Mr. Tromm and Hespeler support a finding of an interrelationship of operations. The only evidence of a representation to the public that Hespeler and Puslinch are a single, integrated enterprise comes from the use of the same premises and the impression of the part-owner of X.D.G. that the work of concrete flooring could be performed by either Hespeler or Puslinch. The evidence with respect to the centralized control of labour relations is revealed by the fact that the only evidence before the Board on this point is the uncontradicted evidence that only Mr. Tromm appeared to be in charge of Hespeler and only Mr. Tromm served as a superintendent of Puslinch.

23. In *Walters Lithographing Co. Ltd.*, [1971] OLRB Rep. July 406, the Board stated the criteria for determining whether there is common direction and control. These criteria are: 1) common ownership or financial control; 2) common management; 3) interrelationship of operations; 4) representation to the public as a single, integrated enterprise; and 5) centralized control of labour relations. Having regard to the evidence before it, the Board is satisfied that the last four criteria have been established with respect to the two respondents. The Board makes this finding based essentially on the evidence provided by the applicant. The thinness of the evidence in some instances is due to the fact that the respondents chose to perform concrete flooring work outside the geographical jurisdiction of Local 1081 in Toronto and

Hamilton, thereby making the detection of the conduct of the respondents immeasurably more difficult for investigation by the applicant. In addition, the recalcitrant behaviour of the respondents has denied the Board the opportunity to develop a more complete understanding of the affairs of the respondents.

24. The Board finds that Hespeler and Puslinch are carrying on associated or related activities or businesses under common control or direction. In determining whether to grant relief under the provisions of section 1(4), the Board considers whether there has been any erosion of the union's bargaining rights. See, for example, *Kustom Insulations Ltd.*, [1979] OLRB Rep. June 531. On the evidence in this application, there has most certainly been an erosion of bargaining rights which the applicant holds with respect to Hespeler. This application has been made within a reasonable period of time of Local 1081's becoming aware of Puslinch's existence and the Board is prepared to issue an order with respect to the bargaining rights. The Board declares that Puslinch and the applicant are bound to the same provincial collective agreement that is binding on Hespeler and the applicant, namely, the current provincial collective agreement between the Employer Bargaining Agency - Labourers, and the Labourers' International Union of North America, and the Labourers' International Union of North America, Ontario Provincial District Council.

25. The applicants have also requested relief under section 63. The evidence before the Board does not disclose a sale of a business within the meaning of section 63. The respondents appear to be in existence with no indication that Hespeler has either been wound up or that it has sold its business rather than sold certain assets within the meaning of section 63 to Puslinch. In these circumstances, the request for relief under section 63 is denied and the application under section 63 is dismissed.

3319-84-U Gary Hopkins, Complainant, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 199, Respondent, v. General Motors of Canada Limited, Intervener

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Whether extreme delay in filing complaint – Whether difficulty of obtaining legal advice acceptable explanation – Whether delay due to absence of necessary information from union – Prejudice to union and employer considered in refusing to entertain

BEFORE: *Paula Knopf*, Vice-Chairman.

APPEARANCES: *Dan Toppari, Gary Hopkins, Alfred Hopkins, Ron Davis, Don Adams and Louis Dudzik* for the complainant; *L. A. MacLean, G. Michaud, John Washuta* for the respondent; *J. K. Cameron* for the intervener.

DECISION OF THE BOARD; May 27, 1985

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent union contrary to section 68 of the Act.

2. At the commencement of the proceedings, the respondent and the intervener raised the preliminary objection regarding the timeliness of the complaint. The Board was asked to exercise its discretion under section 89 to refrain from enquiring into the merits of the complaint because of the length of time in bringing the complaint before this Board. In light of this submission, the Board entertained evidence and submissions with regard to the question of delay.

3. The background to the proceedings was outlined in Schedule A to the complaint. Counsel for the respondent and the intervener were prepared to accept the allegations in the complaint as factual solely for the purposes of argument on the issue of delay. These facts reveal the following. In the latter part of 1973, the complainant was suspended from employment. He filed a grievance which was resolved by the Union and the Company with him being reinstated with time lost to be considered as a penalty. In addition, his employment was agreed to be "solely at the discretion of management for a period of one year following his reinstatement. He then returned to work after recovering from a car accident in September of 1974. He objected to the work assigned him upon his return and instructed the union to file a grievance about this. This was followed by a series of absences and re-attendance at work in which he continued to complain about the job which was assigned to him, alleging that he was physically not capable of doing the work.

4. On or about November 4, 1974, the complainant had a conversation with a Mr. J. Copeland who is the Company's labour relations representative. While there is some factual dispute about what Mr. Copeland told the complainant, it is the complainant's evidence that he was advised to present himself to the Company's doctor the following day for an examination. The complainant denies that he was also told that failure to do so would result in his termination. However, in any event, it appears that the complainant was then seen the next day by his own personal doctor in the absence of the Company doctor when he presented

himself. The following day he received a notice of discharge with the reason given that he was an undesirable employee.

5. A grievance was filed against the discharge on November 7, 1974 by the Union. The Union and the Company held a meeting regarding the grievance on November 13, 1974. The complainant is unable to advise the Board as to what occurred with the grievance other than the fact that the case did not proceed to arbitration and he received no compensation or reinstatement. The complainant alleges that at no time did he indicate to the Union or the Company that he was content or would consent to the grievance being discontinued without redress to him.

6. It is clear that the complainant did not let the matter drop. He made several contacts with various representatives of the Union between 1974 and 1978. However, by 1978, he was told by the Union that they considered his case as a dead issue and that he was history. Further, it was made clear to him that the grievance would not be carried any further by the Union.

7. From 1978 onward, the complainant attempted to pursue the issue of his discharge through several lawyers. The first lawyer he contacted did not follow through with his case. In April of 1979 he attempted to obtain another lawyer. This too failed. In the fall of 1979 he contacted a third lawyer who advised him by letter dated March 26, 1980 that he was too busy to act for the complainant. It seems that he saw a number of other lawyers who either did not know how to proceed against the Union or felt that by the time the case had been brought to them too much time had passed for them to be able to bring a successful case. In the complainant's own words no one was too impressed to take up the flag on this issue because of the delay.

8. In 1982, the complainant was still seeking redress. He approached Mr. John Clout who was at that time the new Chairman of his Local. At the complainant's request, Mr. Clout obtained documentation regarding the original case. He advised the complainant that he could pursue an appeal to the Union's international body and he suggested that the complainant consult a lawyer. He even agreed to set up the appointment with the lawyer for the complainant. The lawyer who was suggested was a lawyer who had done advisory work for the Union in the past. This was Mr. Peter Elliot.

9. Thus, in late 1982 Mr. Elliot was engaged by the complainant to act against the Union. Mr. Elliot advised the complainant to draw up a summary of his case and to contact both the Union and the Company to obtain details about the case. Mr. Pat Clancy, the Sub-Regional Director of the Union, responded to the complainant's enquiries with copies of statements of the unadjusted grievance but indicated difficulties in finding out further about what had happened to the case because of the delay in time. He promised to forward any further information he could find. No further information was forthcoming from Mr. Clancy.

10. In any event, by late 1983, Mr. Elliot advised the complainant that the case was ready to be taken to the Labour Relations Board. However, shortly thereafter, the complainant discovered that Mr. Elliot was facing criminal charges and had been disbarred.

11. The complainant's file in Mr. Elliot's office was taken over by Mr. Garth Roberts

who was appointed by the Law Society to wind up Mr. Elliot's law practice. When the complainant attempted to obtain his file, he was advised by Mr. Roberts that the file could not be located. In the next few months, the complainant contacted another three or four lawyers. None of them were prepared to take on the case.

12. The complainant then retained a lawyer some time in 1984 who indicated he was prepared to take on the case. He asked the complainant to prepare another summary of the situation. This took the complainant a few months. After having the file for approximately eight months, that lawyer advised the complainant that he had realized that one of his partners had previously worked for the Union and therefore was in a position of conflict of interest and could no longer act. That firm referred the complainant to his present solicitors who filed the complaint before this Board on March 12, 1985.

13. The position of the complainant is that the onus must be on the respondent to show that the delay has in some way prejudiced it from having a fair hearing. It was submitted on behalf of the complainant that that onus had not been met. Further, any delay ought to be attributable to the Union rather than the complainant. It was the complainant's position that because he and his lawyers had difficulty in getting information from the Union, they were unable to file a proper complaint until 1985. It was said that he needed to know where the grievance stopped, who handled the case, why it was dropped and who attended the grievance meetings in order to have sufficient information to draft a proper complaint.

14. The position of the Union was that the length of time that has passed since the issues in question arose is of such an extreme nature that it will be substantially prejudiced in the defence of the allegations. In particular, counsel for the Union stressed that there will be serious issues of credibility raised by the proceedings that cannot be properly determined because of the fading memories and lost documentation that would have been available had the complaint been made in a timely fashion. The Union argues that at best, the complainant's cause of action would have crystallized in 1978 when he was told by the Union that his case would not be pursued any further. It was submitted that no acceptable explanation has been given for any delay which occurred and that the Union has not been shown to be responsible for any of the delay. Counsel for the Union referred the Board to the following cases: *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113, *Caravelle Foods*, [1983] OLRB Rep. June 875, *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417, and *Stelco Inc.*, [1983] OLRB Rep. Dec. 2102.

15. Counsel for the intervener stressed that severe prejudice would result to the intervener if the case is allowed to proceed. It was pointed out that the relief requested was reinstatement with monetary compensation and that this would involve a potential monetary award involving approximating one quarter of a million dollars. However, the more substantial prejudice that concerned the intervener's counsel was the fact that one of the key players or crucial witnesses for the intervener was now dead. Mr. Copeland, who was the person who had the conversation with the complainant on the day prior to the dismissal and who was an important element in the intervener's case, was therefore unavailable. Even when counsel for the complainant then stated that he would be prepared to accept the intervener's version of the telephone conversation as originally stated by the Employer at the time of the grievance, counsel for the Company pointed out that prejudice would still occur because of the unavailability of Mr. Copeland. In addition, the problem of fading memories and difficulties in

obtaining documentation would also prejudice the Company. It was submitted that the complainant's reasons for his delay ought only to be considered as excuses rather than as satisfactory explanations. Finally, counsel for the intervener stressed that the stability of the relationship between the Union and the Company would be seriously harmed if a dispute which was over ten years old could be reopened by the Board. It was submitted that this case does not raise any exceptional issues or matters of public policy which should entice the Board to enter into an enquiry on the merits under the circumstances of this case.

The Decision

16. When events which form the subject matter of a complaint under section 68 of the Act occur a long time before the complaint is filed, the Board can call upon the complainant to show cause why the Board ought to exercise its discretion under section 89 of the *Labour Relations Act* to hear the complaint. In such an enquiry, the onus is on the complainant to convince the Board that the complaint ought to be heard (*Stelco Inc.*, *supra*).

17. It is true that the Act does not contain a strict limitation period for the filing of complaints under section 89. Surely this is to allow for the necessary flexibility in dealing with individual cases to ensure that justice is done to all parties. However, this Board has developed a clear jurisprudence which deals with the necessity of weighing the legitimate concerns of all members of the labour relations community. The Board's approach and its considerations have been described in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420 as follows:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it – including the employees – are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* (1966) 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of response with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than year.

18. In the case at hand, one can be sympathetic with an individual's difficulty in obtaining competent legal advice and with the frustrations which must have resulted from relying upon a lawyer who was subsequently disbarred. The legal profession may not have served the complainant very well. However, this Board has said many times that the respondent cannot be made responsible for any omissions or negligence on the part of the complainant's own agents. See *Sheller-Globe of Canada, Ltd.*, *supra* and *Chrysler Canada Limited*, *supra*.

19. The situation might have been different if the evidence established that the delay could be attributable to the Union itself. However, the evidence in this case does not establish that. The complainant's evidence was that in 1982 his Local's president, Mr. Clout, had provided him with information and directed him to a lawyer to represent his interests. There is no evidence that any further information was required in order to file the complaint. While counsel for the complainant has suggested that further information was required in order to properly draft the complaint, this cannot be accepted. None of the details which counsel for the complainant listed above in paragraph 13 as necessary are in fact included in the complaint that was ultimately filed in this case. Further, there are no individuals named as respondents in this case so the names of further individuals were not necessary. The evidence also did not indicate that any of the lawyers consulted by the complainant indicated that their difficulty in pursuing his case was based on a lack of information. Instead, they indicated that their difficulty had to do with the delay which faced them as early as 1980. If any information had actually been required, it could have been obtained through the launching of the section 89 proceedings themselves. There are remedies available to any party with respect of absences of particulars in complaints before this Board. However, this cannot and does not prevent a timely application from proceeding when it is properly launched.

20. The information before this Board indicates that the cause of action against the Union, if any, crystallized, at the latest, in 1978. It was at this time that the complainant admits that he was definitively told by the Union that it did not intend to pursue his discharge grievance any further. It was at this time that he knew that he could expect no further assistance from the Union and it is also clear that he knew that he felt that the Union was failing to represent him properly. But, even if the Board were to accept that it took the complainant until 1982 to obtain the necessary information to realize that he had a proper claim against the Union, the only explanation for the delay since that time is the difficulty he had with lawyers.

21. Therefore, taken at its best, the complainant's case involves a delay of three years before the complaint was lodged. Taken at a middle ground, there is a delay of seven years

from the time that the cause of action crystallized in 1978. In addition, taken at its worst, the complaint dates back to events which occurred as long ago as 1973.

22. In order to do justice to all the parties concerned, there is no way that the complaint could be heard without enquiring into events which date back to 1973. The Board was advised of the prejudice which would face the intervener as a result of the death of Mr. Clout. Further, the Board was advised by counsel for the Union that the necessary documentation that the Union might have been able to present has now been lost. In addition, it is inevitable that the lengthy delay will create significant difficulties with regard to fading memories. As the Board has stated in the *Sheller-Globe Canada, Ltd.* case, *supra*:

[a] delay of the present magnitude [2 years and 7 months] carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. . . . It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concessions to damages. In circumstances such as the present, the onus shifts to the complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

23. No matter whether the Board considers 1982 or 1973 as the date to start the time clock for assessing the delay, the delay can only be considered as extreme. In these circumstances, if the complaint were to be reopened, it is impossible to see how the parties to any collective agreement could consider grievance resolution to be stable if they feared that their mutual resolutions could be reopened as late of ten years later.

24. In light of the evidence and submissions made and the clear practice and jurisprudence of this Board, it must be concluded that the extreme delay in the filing of the complaint has resulted in the impossibility of having a fair hearing for all the parties and the substantial danger of disrupting the collective bargaining relationship between these parties and the labour relations community. While the Act certainly accords the individual rights to pursue against its union where the individual feels that there has been a breach of section 68, these rights must be asserted in a timely fashion to enable the Board to make a fair and just determination of the real issues raised by the complaint. In this particular case, that is now impossible.

25. For all these reasons, the complaint is therefore dismissed.

3202-84-U United Food and Commercial Workers International Union, Complainant, v. **J. Paiva Foods Ltd.**, Respondent, v. Canadian Union of Restaurant and Related Employees, Intervener and eight other files

Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Complainant union in midst of campaign to displace incumbent – Notice disparaging complainant and favouring incumbent permitted on company bulletin board – Notices contemplated by collective agreement and s.46(1)(c) of Act – Dismissed for lack of *prima facie* case – Test for *prima facie* case reviewed

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *W. H. Wightman* and *W. F. Rutherford*.

APPEARANCES: *Mark Zigler* and *Kevin Park* for the complainant; *B. O'Byrne* and *A. Morrow* for the respondents; *R. Ross Wells* and *James Whyte* for the intervener.

DECISION OF THE BOARD; March 28, 1985

1. These are complaints filed under section 89 of the *Labour Relations Act* which came on for hearing at the same time. Counsel for all parties agreed that the submissions made should apply to all of the proceedings.
2. The Board issued the following oral ruling at its hearing on March 21, 1985 after receiving submissions from all counsel and recessing to consider those submissions:

Oral Ruling

The Board has before it nine complaints alleging a violation of section 64 of the Act filed by the complainant against the nine respondents in respect of eleven Swiss Chalet Restaurants. The complainant has also filed applications for certification in respect of these respondents which are presently before another panel of the Board. The intervener was party to a collective agreement to which eight of the respondents were bound which expired on November 8, 1984 (see exhibit #1) and to another collective agreement which expired on May 16, 1982 (see exhibit #2) to which the respondent 485376 Ontario Limited was bound. The parties agreed that the terms and conditions under those agreements were applied by the respondents at all material times.

Counsel for the respondents asks this Board to dismiss these complaints because he submits that they do not disclose a *prima facie* case. The Board is asked to assume that all of the facts asserted in the complaints are established. Counsel submits that on those facts, no violation of the Act is made out.

The Board's discretion to dismiss a complaint on the grounds that it does not disclose a *prima facie* case should only be exercised in the clearest of cases, that is, when the Board is satisfied that there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged. This approach has been set out in the *International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233 at page 234:

Although counsel for the respondents contended that the Board has a duty to dismiss a complaint which does not make out a *prima facie* case, section 71(1) clearly provides the Board with a discretion. In some circumstances it is eminently appropriate for the Board to exercise its discretion under that provision to dismiss a complaint where it is apparent that no useful purpose would be served in listing the complaint for hearing since the facts as alleged could not support an argument that a violation of the Act had occurred (see, for example, *Heist Industrial Services*, 63 CLLC 16,263; *Patternmakers Association of Hamilton and Vicinity*, [1970] OLRB Rep. Sept. 688; *Ernest D'Andrea*, [1975] OLRB Rep. Aug. 646; *Local 1285 United Automobile Aerospace & Agricultural Workers Union of America*, [1975] OLRB Rep. Apr. 387; *Masonry Contractors' Association (Toronto-Incorporated)*, [1970] OLRB Rep. Dec. 1124; and *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597).

See also *Caravelle Foods*, [1983] OLRB Rep. June 875 at page 881 where the Board stated:

The words '*prima facie*' in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render *reasonable or arguable a conclusion that the Act has been breached*.

[emphasis added]

See also *Shaw v. McLeod*, (1982), 35 O.R. (2d) 641.

Counsel for the complainant submits that the respondents violated section 64 of the Act by permitting or approving the posting of a notice (see exhibit #3) in the premises of the respondents on the bulletin boards that are used by the intervener. The notice that was posted is clearly a notice that appears to have been prepared by the intervener and is, at the very least, disparaging of the complainant and its attempts to negotiate on behalf of the employees in a Swiss Chalet Restaurant in Ottawa. There is an ongoing organizing campaign by the complainant in respect of the employees of the respondents. It is clear to us that the notice was intended to draw support away from the complainant and in favour of the intervener while the pending certification applications referred to earlier are being dealt with by the Board.

Counsel for the respondent relies on Article 20 of both of the collective agreements. Those Articles provide:

Exhibit #1

Article 20 – Bulletin Board

20.01 The Association's members [all of the respondents herein, but for 485376 Ontario

Limited] agree to permit the Union to keep notices of meetings and other Union business and affairs on a bulletin board provided by the Association for such purposes. It is agreed that before being posted, such notices must first be approved in writing by the store manager.

20.02 All such notices must be signed by a Union Officer.

20.03 Union notices will be restricted to:

- (a) Notices of Union meetings;
- (b) Notices of Union elections or appointments;
- (c) Notices of results of Union elections;
- (d) Notices of Union recreational and social activities; and
- (e) All other notices concerning Union activities.

Exhibit #2

Article 20 – Bulletin Folder

20.01 The Company [485376 Ontario Limited] agrees to permit the Union to keep notices of meetings and other Union business and affairs in a bulletin folder provided by the Company for such purposes, such folder to be kept at the store premises. It is agreed that before being placed into the bulletin folder, such notices must be first approved in writing by the store manager.

The notice posted on the bulletin boards appear to us to be the kind of notice contemplated by the above quoted provisions. The respondents permitted the notice to be posted, it is submitted by counsel for the respondents, pursuant to their obligation to do so under the terms and conditions of those collective agreements.

Counsel for the complainant submits that the employer could and should not have approved the posting of the notices because employees would perceive that the employer is supporting the intervener, the incumbent union, over the complainant, and further, that such approval is conduct prohibited by section 64 of the Act.

We disagree.

The use by an incumbent union of a notice board pursuant to a collective agreement or to the terms and conditions of a collective agreement that have been extended by section 79 of the *Labour Relations Act*, appears to us to be contemplated by section 46(1)(c) of the Act. That section provides:

46.-(1) Notwithstanding anything in this Act, . . . the parties to a collective agreement may include in it provisions,

• • •

- (c) for permitting the trade union that is a party to or is bound by the agreement *to use the employer's premises for the purposes of the trade union* without payment therefor. [emphasis added]

In our view, employer conduct pursuant to the collective agreement provisions that are permitted by section 46(1) cannot be a violation of section 64, by virtue of the opening words of section 46(1), notwithstanding anything in this Act.

Therefore, the cases cited by counsel for the complainant relating to employer support of employee associations that were not parties to a collective agreement are of no assistance to him.

Since we are satisfied that no violation of section 64 can be made out on the facts asserted by the complainant, we adopt the approach of Mr. Justice Grange in the *Shaw v. McLeod* case, *supra* where he stated at page 643:

I concede that on this motion if, after a careful review of the law, the Court determines that he [the Plaintiff] cannot possibly succeed, then his action should be mercifully dispatched.

Therefore, the respondents' motion is granted and these complaints are hereby dismissed.

0044-85-R; 0045-85-R United Steelworkers of America, Applicant, v. **Kuehne & Nagel International Limited**, and 3M Canada Inc., Respondents, v. Group of Employees, Objectors

Bargaining Unit – Practice and Procedure – Unit sought covering employer's operations in two municipalities – Whether regular and significant employee interchange – Whether justifying departure from Board policy of municipality-wide units

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

DECISION OF THE BOARD; May 8, 1985

1. The name: Kuehne & Nagel Distribution Services appearing in the style of cause of this application as the name of a respondent is amended to read: Kuehne & Nagel International Limited. It is understood that the certification application is in respect of Kuehne & Nagel International Limited in its Distribution Services Division.

2. This is an application for certification. The applicant also sought a declaration of a related employer pursuant to section 1(4) of the *Labour Relations Act*.

3. The Board hereby directs that the above applications be and the same are hereby consolidated.

4. With respect to the certification application, the applicant sought a bargaining unit description which covered two municipalities, namely, the City of Brampton and the City of Mississauga. The applicant asserted that this was an appropriate case for the Board to depart from its general policy with respect to bargaining unit descriptions, i.e., municipal-wide bargaining units. The applicant then proceeded to relate a number of facts to the Board. It was agreed that the Board would assume that the facts as presented were true and then determine whether those facts were sufficient to raise a serious question as to whether it would be appropriate for the Board to depart from its usual practice in defining bargaining units. If the Board found in favour of the applicant on this preliminary assessment, the Board would then proceed to hear the evidence in detail.

5. The Board does not intend to set out the facts asserted by the applicant at great length. Examples were given of various terms and conditions of employment common to all employees regardless of their work location. The applicant submitted documentary evidence in the form of a common policy manual and two memos to employees which indicated that employees could readily be assigned work at various locations of the company in the Cities of Brampton and Mississauga. For convenience, the manual, the memo dated December 28, 1984 and the memo dated March 5, 1985 are marked as exhibits 1, 2 and 3 respectively. The work histories of two employees were reviewed; both revealed a not infrequent transfer between various locations and reassignment of work. Counsel stated that employees were moved back and forth between locations and, as well, goods could be warehoused initially in one location but subsequently transferred to other locations. It was recounted that seniority was divided along municipal boundaries but employees carried their seniority with them when reassigned and, further, could request to displace another employee in the other municipality who had less seniority. By way of argument, counsel for the applicant asserted that the factors with respect to community of interest as set out in *Usarco*, [1967] OLRB Rep. Sept. 526 were satisfied on the instant facts and that, in particular, there was a functional coherence and interdependence between the operations in the two municipalities. Counsel referred to Sack and Mitchell, *Ontario Labour Relations Board Practice and Procedure* (Butterworths, 1985) at Ch. 3:3140 wherein the Board policy and the exceptions thereto are discussed. Moreover, counsel referred to *Adams Furniture Company*, [1975] OLRB Rep. June 491 and *Wix Corporation*, [1975] OLRB Rep. Aug. 637. It was contended that the facts as outlined raised a serious argument that the general Board policy should not be followed in this case.

6. Counsel for the respondent Kuehne & Nagel added a few additional facts, including that there is a separate management at the local level at each location although above that level there is common senior management. Further, the size of the warehousing facilities at the Brampton location is roughly equal to that in the three Mississauga locations combined. Counsel did not dispute the assertion that there were exceptions to the Board's general policy of certifying on the basis of municipal-wide units and that the test for such exceptions was whether there could be demonstrated a regular and substantial interchange amongst employees at the various locations, in the context of the usual community of interest factors. Counsel referred to *Wittich's Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Perimeter Industries*, [1973] OLRB Rep. Mar. 174; *Bruce Peninsula*, [1982] OLRB Rep. May 656; and *F. W. Woolworth Co. Limited*, [1981] OLRB Rep. June 653. Essentially, counsel contended that the facts asserted by the union did not satisfy the relevant test.

7. In reply counsel for the applicant distinguished the cases cited by counsel for the respondent Kuehne & Nagel and stressed that the considerations may well be different where the employer was asserting a larger unit was appropriate. That is, in those cases, it was argued that the caselaw indicated a concern with self-determination and the viability of the collective bargaining units sought. In the instant case, counsel stressed that the circumstances related were not isolated incidents but revealed a pattern in which the employer dealt with the employees as a single integrated work force regardless of location.

8. At the hearing, the Board made the following oral ruling:

The Board has considered the parties' submissions and reviewed the cases cited where copies were provided. The Board considers that the cases indicate that there are exceptions to the general policy of municipal-wide bargaining units, although such exceptions are relatively rare or, to state the matter conversely, the general policy may be described as being relatively firm. The test or standard for departure from municipal-wide units is usually expressed as regular and significant interchange in the context of the other community of interest criteria, as established in the *Usarco* case, and whether there is sufficient membership support for the applicant to respond to the Board's concerns regarding employees being swept in or denied self-determination. In this case, the applicant asserts, through the stated facts, that there is at least enough of an indication of regular and significant interchange and community of interest and widespread union support that it should be permitted the opportunity to present detailed evidence to satisfy the test. With this assertion, the Board agrees. What the Board has heard thus far by way of stated facts assumed true is enough to raise a serious issue as to whether the Board should depart from its usual policy in defining bargaining units by reference to municipality. Accordingly, the Board appoints a Board Officer to inquire into this matter.

Further, however, the Board directs the Board Officer to inquire into the community of interest, alleged by counsel for the employee objectors, between only the employees at the 3M warehouse in Mississauga (excluding the purely Kuehne & Nagel and purely 3M employees). It is clear that counsel's position in this regard is that such a unit is appropriate on a community of interest basis regardless of whether the Board ultimately would depart from a municipal-wide description in respect of the applicant's claim. It is expeditious and appropriate, therefore, to combine both community of interest inquiries.

With respect to proceeding further, the Board is not persuaded that it would be appropriate to commence hearing evidence today on any of the other issues (e.g., the 1(4), allegations of union misconduct in soliciting membership, the petitions, the counter-petitions). Firstly, the determination of the bargaining unit is critical to assessing the remaining issues and, more importantly, the hour is now relatively late to commence *viva voce* evidence.

Therefore the Board appoints a Board Officer to inquire into and report back to the Board on the community of interest: (1) between employees of Kuehne & Nagel at the various locations in Brampton and Mississauga; (2) amongst employees of Kuehne & Nagel at the 3M warehouse in Mississauga (excluding those described by the parties as purely Kuehne & Nagel or purely 3M employees), that is, amongst this former group separate from the other employees at the various locations of the respondent in Brampton and Mississauga.

The Board, finally, appoints a Board Officer to inquire into whether there is a history of part-time employees at the various locations of the respondent in Mississauga and Brampton, given the position of counsel for the respondent Kuehne & Nagel that there were no such part-time employees at the application date but there is a history of employing such persons.

Finally, the Board will direct the Board Officer to proceed with the inquiries as expeditiously as possible and, particularly, will stress the need to provide the transcripts subsequent to the conclusion of the examinations without extended delay.

10. The Board hereby confirms the above oral ruling. It should be noted that the Board rendered a further oral ruling rejecting a submission by counsel for the applicant that the Board should give specific dates for completion of the examinations by the Board Officer and the production of transcripts. The Board does not consider it necessary to set out the submissions and the Board ruling in detail on this matter.

11. Accordingly, this matter is hereby referred to the Registrar. This panel is not seized in respect of the issue remaining in dispute between these parties.

2655-84-R Loeb Inc., Applicant, v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, Respondent

Jurisdictional Dispute – Sale of a Business – Employer implementing administrative re-alignment of its various wholesale operations – Claiming sale and seeking re-definition of several units into single unit – Whether sale provision applying to transfers within divisions of same company – No intermingling where scope clauses in various agreements not in conflict – No jurisdictional dispute – Dispute deferred to arbitration

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman* and *C. A. Ballentine*.

APPEARANCES: *Brian P. Smeenk, Richard Laniel, G. Gillespie, P. Best* and *K. Overall* for the applicant; *Harold F. Caley, Robert Kelly* and *Rick Kelly* for the respondent; *Robert Castiglio* and *Rino Grondin* for the intervener.

DECISION OF THE BOARD (ORALLY); May 30, 1985

1. This application arises out of an administrative re-alignment by the applicant employer of its various wholesale operations. The applicant applies under section 63 of the *Labour Relations Act* to have the Board, in effect, re-define a number of its existing bargaining units, under current collective agreements, as one single bargaining unit, in accordance with its own administrative re-organization, and to cause the parties to negotiate a fresh collective agreement applying to the single enterprise. The applicant also requested the Board, just prior to the hearing, to apply the provisions of either section 91(1) or (18) to reconcile the claims which it says arises under conflicting collective agreements. The matters in dispute, and particularly the question of the respective seniority rights of the various groups of employees affected, is the subject of three policy grievances filed by the respondent trade union, and which have been placed before an arbitrator appointed under section 45 of the *Labour Relations Act*. The respondent is the only trade union involved in these proceedings, and the issue is which, if any, of its various collective agreements with the applicant now apply to the work being performed in the reorganized division. It is the position of the respondent that the matters at issue are properly the subject matter of arbitration, and ought to be permitted to proceed in that fashion. The applicant argues that an arbitrator would lack the capacity to deal with the matters in dispute, and that only the Labour Board has sufficient powers to deal with the problems at hand.

2. The Board is prepared to assume that the provisions of section 63 of the Act can, in appropriate circumstances, apply to transfers within divisions of the same company. The question remains, however, whether on the facts as stated before us, the applicant would be entitled to the extraordinary form of relief which is the basis for launching these proceedings. We agree that this Board and others have been vigilant in protecting and preserving existing collective agreements under the successorship provisions granted by the Act, and the cases cited by the applicant, finding that an employer does not avoid its collective bargaining obligations simply by transferring work from one division or subsidiary to another, stand for no more than that. That is the reason section 63 empowers the Board to continue the application of a collective agreement for the like bargaining unit, simply preserving the status quo, and that is true for *each* collective agreement said to be affected by a sale. The situation

before the Board in this case cannot be dealt with by the Board, nor by one of the parties unilaterally, as if the situation were fresh, and the issue before us now is not what the Board might have considered to be an appropriate bargaining unit for the newly formed Innes Division in an initial certification proceeding. Every existing collective agreement represents negotiated and entrenched rights and obligations on the part of all parties involved, and the Board's jurisdiction to restructure the scope clauses of existing collective agreements, or otherwise affect the entrenched and negotiated rights of the parties, is to be found under the narrower provisions of section 63(6) of the Act. That subsection requires that an intermingling of the two or more operations in question has taken place, and as the Board articulated in, for example, *Caressant Care Nursing Home of Canada Limited et al*, [1984] OLRB Rep. Aug. 1060 at paragraph 32, the Board for this purpose looks at whether the *work* or job opportunities themselves have been intermingled in the new form of operation.

3. Here it is admitted that the work of the two aspects of the new Innes Division, the Innes Road Warehouse and the L.V.S. Warehouse, remain functionally separate and identifiable. Once that is established, a situation of intermingling, such as to bring into play the operation of subsection 6 of section 63, cannot be said to have taken place simply because the employer decided on its own to proceed to have those separate and distinct jobs performed by employees drawn from various sources. Indeed, the correctness of the employer's decision to staff the Innes Division in that manner is the very issue in dispute in both these and the arbitration proceedings. Within the Innes Road Warehouse, on the other hand, the integration of work from both the Ottawa Grocery Warehouse and the Quebec-based S & S Warehouse could, as applicant counsel has argued, have created a complication to which subsection 6 *would* apply, had S & S prior to this been operating under an Ontario collective agreement which an interested party is arguing should follow the work, but that is not the case here.

4. Counsel for the applicant argues that it would be strange to have the scope of various collective agreements determined by the nature of the work (drivers, office, etc.) or the kinds of products being handled (for example produce versus grocery), but the undisputed facts show clearly that that is precisely how the various collective agreements in question, which are described as applying geographically to the Ottawa area in general, have been understood and applied by the parties in the past, even within a single location. It would not appear that the parties have ever had any difficulty in the past in determining to which aspect of the Loeb operations a particular collective agreement at a particular location applies, and there has been nothing stated to us on the present facts which would suggest that the parties would have any difficulty in doing so in the future.

5. In sum, therefore, either the other apparently Ottawa-wide collective agreements (and particularly the grocery agreement) are in fact site-specific and do not apply at the Innes Road location, as the applicant argues as its first position, in which case the applicant *has* no conflict from which to extricate itself, or the collective agreements apply to the Innes Road location on the same basis (i.e. according to the type of employee or product, as the case may be), as they always have in the past at the various Loeb locations, including Innes Road. The collective agreements themselves, in other words, as applied by the parties in the past, do not contain conflicting scope clauses. On that basis, we would find section 91(18) to be inapplicable as well. We would add that this case does not involve the kind of jurisdictional dispute which would cause us to exercise our discretion under section 91(1) as well.

6. We recognize that there are some real and important issues between the parties, in

particular as regards the competing seniority claims of the various Loeb employees, but the issues raised by this case are not matters which fall to be determined by the Labour Board. They are issues which should and normally do proceed to arbitration, as the respondent has endeavoured to do in this case. Arbitrators are frequently called upon to determine whether the collective agreement under which they are appointed is applicable to the particular work in dispute, and if so, what is the seniority status of employees transferring or seeking to transfer into the bargaining unit covered by that collective agreement. Both are matters simply of interpreting the relevant language of the collective agreement, together where appropriate with consideration of the past practice between the parties. It would appear that the procedure could be simplified even further by the parties agreeing to have the grievances under the three collective agreements in dispute placed before the same arbitrator for determination, if the parties have not already done so.

7. This application before the Board is dismissed.

3313-84-R Sudbury Mine, Mill & Smelter Workers Union Local 598, Applicant, v. **Mansour Rockbolting Limited** and Mansour Mining Equipment Supply and Repair Incorporated, Respondents, v. Group of Employees, Objectors

Certification – Practice and Procedure – Employer altering terminal date on posted Form 6 in good faith – Alteration not authorized by Board – Not reason to extend terminal date in particular circumstances

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *M. Eayrs* and *P. V. Grasso*.

APPEARANCES: *John B. Lang* and *Roland K. Gauthier* for the applicant; *Milad Mansour*, *Rose Mansour* and *Claude MacMillan* for the respondent; *Michel G. Landry* for the objectors.

DECISION OF THE BOARD; May 3, 1985

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. At the hearing of this application, we were advised that the correct names of the respondents were: Mansour Rockbolting Limited and Mansour Mining Equipment Supply and Repair Incorporated, and the style of cause has been amended accordingly. We were also advised that the respondents carry on associated or related activities or businesses under common control or direction, and that the parties had agreed that the Board should grant the trade union's application under subsection 1(4) for a declaration that the Board treat the respondents as constituting one employer for the purposes of the *Labour Relations Act*. We so declare.

4. Having regard to the agreement of the parties, we find that:

all employees of Mansour Rockbolting Limited and Mansour Mining Equipment Supply and Repair Incorporated in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff,

constitute a unit of employees of the respondents appropriate for collective bargaining.

5. The respondent employers filed a list of employees in the bargaining unit showing a total of ten names. Two of those named were not at work on the application date. Both had been at work within the thirty day period prior to the application date, but neither had returned to work within the thirty day period following that date. Neither, therefore, fell within the scope of the Board's usual test in determining who were employees of the respondents on the date of the application. Accordingly, there were eight employees of the respondents in the bargaining unit on the date of the application.

6. The applicant trade union filed eight combination membership applications and receipts. The names on seven of those documents coincide with the names of employees of the respondents in the bargaining unit on the date of the application. Each of the documents indicates the Local is properly dated and bears original signatures which correspond with signatures on specimens provided by the employers. The documents also indicate the payment and receipt of \$1.00, and bear the signature of a collector and the countersignature of the employee applicant. All of the applicant's membership evidence was delivered to the post office and tendered for registered mailing on March 28, 1985, the terminal date fixed for this application, was accompanied by a declaration in Form 9 signed by a responsible officer of the applicant attesting to the authenticity of the membership evidence.

7. On April 4, 1985, the Board received a handwritten statement of desire dated April 1, 1985, apparently signed by six of the employees in the bargaining unit on the application date. Their representative, Mr. Landry, had posted the document to the Board by registered mail on April 1, 1985. In his letter to Mr. Landry acknowledging receipt of this document, the Registrar noted that it appeared it had been mailed to the Board after the terminal date.

8. Subsections (1), (2) and (3) of section 73 of the Board's Rules of Procedure provide:

(1) *Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,*

- (a) *is accompanied by,*
 - (i) *the return mailing address of the person who filed the evidence, objection or signification, and*
 - (ii) *the name of the employer; and*
- (b) *is filed not later than the terminal date for the application.*

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

(3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection (1) not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.

[emphasis added]

Mr. Landry attended at the hearing of this application on April 12, 1985, to explain the circumstances in which the statement of desire had been filed and to request that the Board extend the terminal date so that the statement of desire could be considered.

9. There was no serious dispute over the facts giving rise to Mr. Landry's request. Upon receiving the applicant's application for certification, the Board gave notice of the application of the respondent employers. The material sent to the respondents included copies of a Reply in blank, Schedules on which the respondents were directed to list the persons they employed as of the date of the application in the bargaining unit applied for by the applicant, several copies of a green Notice to Employees Application for Hearing Certification and of Hearing which the respondents were required to post immediately in conspicuous locations on their premises and a Return of Posting card by which the respondents were to advise the Board of the date of posting of the green notices. Those notices were posted between 12 noon and 1:00 p.m. on Friday March 22, 1985, and Return of Posting cards were completed and returned to the Board accordingly. On Tuesday March 26, 1985, Milad Mansour, the President of the respondents, spoke by telephone to an official of the Board. He said the company solicitor was out of town until the terminal date, March 28th and that the respondents could not complete and return their replies and schedules of employees by that date. The official in question is reported to have said that it would be satisfactory if the respondents' replies and schedules were mailed to the Board on Monday April 1, 1985. Two days after this conversation, Rose Mansour, the respondents' bookkeeper, had a morning meeting with the company's solicitor. After that meeting, she used a pen to alter by hand each of the posted Form 6 Notices by changing paragraph 3, which then read:

3. The terminal date fixed for this application as directed by the Board is the 28th day of March, 1985.

by striking out 28th and March out with pen and writing in their place 01 and April respectively. It is not contended that this alteration was in any way authorized or suggested by any official of this Board. Rose Mansour simply and mistakenly thought that the change should be made as a result of the telephone conversation of March 26th. For the purpose of dealing with the question of an extension of the terminal date, the applicant trade union did not dispute Ms. Mansour's good faith in this respect.

10. Mr. Landry's testimony was that the steps leading to the mailing of the statement of desire had not been completed until April 1, 1985, because he believed he had until that date to do so. He based that belief on the fact that Notice had been altered to show the terminal date as April 1, 1985. It emerged, however, that Mr. Landry had actually seen Rose Mansour alter the form. He knew it was she, and not any official of the Board, who had made that alteration on the Board's form. He testified that he had no idea why Rose Mansour changed the form. He made no effort to determine whether the change was authorized by the Board.

Although Mr. Landry was not entirely sure about the dates on which various things occurred, two things were clear. First, it was clear that he had read the unaltered form prior to the date on which it was altered. The second was that, although he said he discussed the pros and cons of having the trade union prior to March 28th, it was not until after the form was altered that Mr. Landry had any discussion with any other employee about the signing of a statement of desire. His first meeting with fellow employees for that purpose was the following day, March 29th, during the lunch hour, and the document in question was not actually prepared until the following Monday, April 1st.

11. Subsection 7(1) of the *Labour Relations Act* requires that we ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who are members of the trade union at such time as is determined under section 103(2)(j). Section 103(2)(j) provides:

(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (j) to determine the form in which and the time as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form as as of the time so determined;

12. When an application for certification is made, the Registrar initially fixes a terminal date for the application, which section 2 of the Board's Rules of Procedure requires be between six and eleven days after the day on which notices of the application are mailed to the employer. Time is of the essence in labour relations matters, and the Board's general practice is to fix an early terminal date. The Board's constant practice is to select the terminal date as the date determined under section 103(2)(j). The provisions of section 73 of the Rules apply equally to an applicant trade union and to objecting employees. As the provisions of Form 6 make clear to the latter, the Board will make its determination on the basis of the written evidence submitted by that date. It is important that that be a firm date. The Board will extend that date if employees have not had adequate notice of it. The Board has had occasion to consider the adequacy of notice on many occasions: see, for example, *Hostess Food Products Limited*, [1980] OLRB Rep. May 710 and the cases referred to therein. The notice in this case had been posted for a full five working days by the time the alteration was made. We are satisfied that that was more than adequate notice to employees, and reject Mr. Landry's argument that the terminal date should be extended merely because, in his view, the employees needed more time to think about whether or not they wished a union.

13. Did the employer's alteration of Form 6 warrant an extension of the terminal date? In our view, it did not. The employees had clear notice that March 28, 1985, had been set as the terminal date for the application. The form went unaltered from March 22nd, when it was posted, to March 28th when it was altered. The alteration was made by hand. Even an employee who had not seen Rose Mansour make the alteration, as Mr. Landry had, would have had no reason to suppose that the Board had changed the terminal date. Accordingly,

at the hearing of this matter we ruled orally that there were in this case no circumstances which we considered would justify an extension of the terminal date.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on March 28, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

3028-84-R International Beverage Dispensers and Bartenders Union, Local 280, Applicant, v. Metro Investment Corporation, Respondent

Sale of a Business – Transfer of all shares not resulting in sale within meaning of Act – Collective agreement continuing unaffected

BEFORE: *Rory F. Egan*, Vice-Chairman, and Board Members *R. J. Gallivan* and *S. O'Flynn*.

APPEARANCES: *Beth Symes* for the applicant; *A. J. Indovina* for the respondent.

DECISION OF THE BOARD; May 14, 1985

1. The correct name of the respondent is Metro Investment Corporation and the style of cause is amended accordingly.

2. This is an application under section 63 of the *Labour Relations Act* brought with respect to the bargaining rights of the applicant as a result of a sale of a business by The Last Resort Hotel Inc. to the respondent on or about the 17th day of January, 1985. The applicant seeks a declaration that Metro Investment Corporation is the successor employer to The Last Resort Hotel Inc. and is bound by the collective agreement dated January 15, 1985 made between The Last Resort Hotel Inc. carrying on business as Doyles Tavern and the applicant herein.

3. The applicant also submitted a complaint under section 89 of the *Labour Relations Act* which it sought to have joined to these proceedings. The complaint under section 89 was set aside pending resolution of the application under section 63 for hearing at a date to be set and this panel of the Board is not seized of the matter.

4. Anthony Indovina, who represented Metro Investment Corporation, took the position that a sale of a business had not occurred but simply a purchase of all the shares of The Last Resort Hotel Inc. carrying on business as Doyles Tavern by Metro Investment Corporation.

5. It was moved by Mr. Indovina that The Last Resort Hotel Inc. still carries on the

business at the premises and is the proper respondent in these proceedings which should accordingly be dismissed insofar as Metro Investment Corporation is concerned. The Board reserved its decision on this motion pending the hearing of the evidence respecting the transaction.

6. The relevant portions of section 63 of the Act are the following:

63.-(1) In this section,

- (a) business includes a part or parts thereof;
- (b) sells includes leases, transfers and any other manner of disposition, and sold and sale have corresponding meanings.

• • •

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

7. Prior to the incidents out of which this application was made, The Last Resort Hotel Inc. carrying on business as DoYLES Tavern was owned and operated by John Doyle. He held all the shares in The Last Resort Hotel Inc.

8. The evidence is that on or about May 31, 1984, Doyle entered into an option agreement with Metro Investment Corporation for the purchase and sale of all the shares of The Last Resort Hotel Incorporated. On or about January 15, 1985 Mr. Anthony Indovina, who testified he held complete and unrestricted authority to act for Metro Investment Corporation, advised Doyle that he, acting on behalf of Metro Investment Corporation, was exercising the option agreement. The option, Mr. Indovina testified, provided for a 3-day closing period. He said that Metro Investment Corporation obtained all the shares of The Last Resort Hotel Inc. on January 18, 1985. He said that it had been agreed upon by Doyle, the latter's lawyer and Indovina that a working relationship between Indovina and Doyle was not possible and that, as a consequence, Doyle left the premises. He had been given a cheque for \$100.00 in accordance with the terms of the option.

9. All of the foregoing evidence was corroborated by Doyle. From the time of his leaving the premises on January 18th, he has had nothing to do with the operation of The Last Resort Hotel Inc.

10. Mr. Indovina testified that from that day forward he ran the hotel on behalf of Metro Investment Corporation. He had the power to hire and fire employees. He had control of labour relations in the tavern and replied to a grievance filed by an employee.

11. The Board finds on the evidence that while all of the shares of The Last Resort Hotel Inc. were transferred to Metro Investment Corporation, and that while the Corporation took full charge of the day-to-day operation and of its employees, no sale of the business has

taken place within the meaning of the *Labour Relations Act*. The transfer of the shares of The Last Resort Hotel Inc. leaves that corporation intact and does not affect the business of the hotel. The taking-over of the management by Metro Investment Corporation is simply a matter which the sole shareholder might have assigned to any other party.

12. The application is accordingly dismissed. It should be noted, however, that the bargaining rights of the union are not prejudiced by this outcome of the application and that the collective agreement referred to above between the applicant and The Last Resort Hotel Inc. remains in effect.

2925-84-U Canadian Union of Public Employees and its Local 3020, Complainant, v. The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic), Respondent

Duty to Bargain in Good Faith – Unfair Labour Practice – Employer proposing total compensation package of 5% as per provincial guidelines – Refusing to provide information including cost of benefit plans – Information necessary to properly evaluate employer proposal – Refusal held to be bad faith bargaining – Board direction restricted to information sought and refused prior to complaint

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *A. Grant* and *W. F. Rutherford*.

APPEARANCES: *Alex Muselius*, *Tim Zaroski*, *Sandie Thomson* and *Arlene Rabideau* for the complainant; *Murray Levis* and *Margaret Ryan* for the respondent.

DECISION OF THE BOARD; May 10, 1985

1. In a decision dated March 29, 1985 in this matter, the Board wrote as follows:

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that it has been dealt with by the respondent contrary to the provisions of section 15 of the Act.

2. For reasons which will issue at a later date, the Board hereby finds and declares that the respondent has contravened section 15 of the Act by refusing to provide the following information to the complainant, and the Board, in the exercise of its remedial discretion under section 89 of the Act, hereby directs that the respondent provide the following information to the complainant forthwith:

- (1) a list of all the employees in the bargaining unit as of March 31, 1984 (the expiry date of the most recent collective agreement between the parties), specifying the following information for each employee: rate of pay, classification, employment status (regular full-time, regular part-time, casual, interim replacement, etc.), and total service credit for vacation entitlement purposes; and
- (2) the respondent's benefit expenditures for the year ending March 31, 1984 for each benefit provided to employees (including O.H.I.P., semi-private hospitalization

insurance, extended health care plan, group life insurance, pension plan, dental plan, and vision care plan).

The purpose of this decision is to provide the Board's reasons for that decision.

2. At the hearing of this matter on March 25, 1985 in Thunder Bay, a number of exhibits were filed with the Board on the agreement of the parties. The parties also agreed upon the following facts:

- (1) Exhibit #1 (a collective agreement signed on July 25, 1982), as extended by Exhibit #2 (an addendum effective from April 1, 1983 to March 31, 1984), is the collective agreement which the complainant is seeking to renew, with amendments, through the negotiations which form the subject matter of this complaint.
- (2) Notice to bargain was mailed to the respondent by the complainant on January 25, 1984.
- (3) The parties met in negotiations on April 2 and 3, 1984, where, among other things, the parties reviewed the complainant's contract proposals (Exhibit #5). The complainant requested basic costing information from the respondent. The respondent's representatives stated that they would not supply the information requested. With respect to the monetary package, they also indicated that it was the respondent's preference to follow the settlement of the host hospital (in this case, the Port Arthur General Hospital), or to settle at a total compensation package of 5% in accordance with the provincial guidelines under the *Public Sector Prices and Compensation Review Act*, 1983, S.O. 1983, c. 70.
- (4) July 25, 1984 was the next negotiating session. The parties met on that day with the assistance of a Conciliation Officer. (By letter dated June 13, 1984 (Exhibit #6), the Deputy Minister of Labour advised the parties that the Minister had appointed Mr. B. Janisse as Conciliation Officer to confer with the parties and to endeavour to effect a collective agreement between them.) At that session, among other things, the respondent's representatives again stated their preference to wait for the host hospital settlement, or to settle for a compensation package of 5% in keeping with the provincial guidelines. At that meeting, the complainant again requested basic costing information and the respondent's representatives indicated that they would not provide it.
- (5) By letter dated August 14, 1984, the Minister of Labour confirmed that the parties were unable to effect a collective agreement.
- (6) By letter dated September 17, 1984, the complainant confirmed its rejection of the respondent's proposal, named its nominee to a board

of interest arbitration, and made a written request for basic costing information.

- (7) On October 15, 1984, Alex Muselius, the complainant's representative, wrote as follows to Dr. J. Kotalik, the Director of the respondent's Thunder Bay Clinic:

This will confirm our verbal requests made during negotiations with the employer representatives. The Union hereby requests that the Employer provide a list of all bargaining unit employees indicating the following information for each person covered by the terms of the collective agreement:

1. Current rate of pay actually being paid,
2. Classification to which employee is currently assigned,
3. Current employment status (eg. – Regular Full-time, Regular Part-time, Casual, Interim Replacement, etc.,).

Please note that this request is made pursuant to Section 15 of the Ontario Labour Relations Act and that the Union requires this information as soon as possible so that it may adequately prepare for the Interest Arbitration hearing as required by the Hospital Disputes Arbitration Act.

Additionally, because of the employer's reliance on the terms of Bill 111 in justifying its monetary position, the Union requests an itemized account of the employer's actual annual cost as at March 31, 1984 for all compensation items (wages, medical benefits, etc.) paid to or on behalf of all bargaining unit employees.

Your co-operation in providing this information at the very earliest opportunity will be much appreciated.

- (8) By letter of November 9, 1984, the complainant again made a written request for the aforementioned information and advised that it intended to seek an order of compliance from the Ontario Labour Relations Board if the information was not given to the complainant.
- (9) By letter of November 23, 1984 (Exhibit #7) Howard D. Brown, the chairman of the arbitration board, confirmed that an interest arbitration hearing would be held on April 10, 1985 in Thunder Bay.
- (10) On January 21, 1985, Mr. Muselius telephoned Murray Levis, the respondent's Personnel Officer, and again requested the aforementioned information. The requested information was again denied.

- (11) On January 29, 1985, the complainant filed the instant section 89 complaint with the Board.
- (12) On February 12, 1985, the respondent provided the complainant with a written settlement proposal (Exhibit #10B). In its response dated February 25, 1985 (Exhibit #10A), Mr. Muselius advised Mr. Levis, without prejudice to the assertions made in its section 89 complaint, that the complainant's bargaining committee would be happy to meet with the respondent's bargaining committee at any mutually convenient time to resume negotiations. In that letter, Mr. Muselius repeated the complainant's request that the respondent supply it with a list of all bargaining unit employees showing name, classification, rate of pay, employment status, seniority credits, and an itemized account of all compensation items (wages, benefits, etc.) paid annually on behalf of bargaining unit employees as at the expiry date of the collective agreement (March 31, 1984).
- (13) On March 19, 1985, the parties met in negotiations and the respondent at that time tendered a written settlement proposal (Exhibit #12).

3. In support of his contention that the respondent contravened section 15 of the *Labour Relations Act* by refusing to provide the requested information, Mr. Muselius submitted that the complainant needed that information, including the cost of the respondent's various benefit plans for bargaining unit employees, in order to be in a position to properly evaluate the respondent's offer of a total compensation package of 5% in accordance with the provincial guidelines, and in order to discharge its duty of fair representation under section 68 of the Act. It was his position that meaningful negotiations could not take place without such information as the complainant would, in effect, be negotiating in the dark.

He also noted that any confidentiality which might otherwise attach to such information has been removed, vis-a-vis the complainant, by the fact that the complainant will ultimately be entitled to obtain it from the Inflation Restraint Board (the IRB). In this regard, he drew our attention to the following passage from page 5 of the IRB's Guide to the Reporting of Group Compensation Changes under the Public Sector Prices and Compensation Review Act (Exhibit #14A):

All information filed with the [IRB] by an administrator relating to the compensation of individuals or groups will be available to those parties directly affected but treated as confidential otherwise.

4. In his submissions on behalf of the respondent, Mr. Levis contended that section 15 does not provide the basis for a flow of information of the type requested by the complainant. He also submitted that the information requested by the complainant in its section 89 complaint was considerably broader than the information requested by the complainant during negotiations prior to the complaint. Mr. Levis told the Board that although the respondent had put forward during negotiations the two positions described above, it was always the respondent's preference to reach a settlement which paralleled that of the host hospital. (He also expressed the view that the employees in the bargaining unit should be

entitled to such a settlement, even if it exceeded the provincial guidelines.) It was his position that the availability to the complainant of the information filed with the IRB by the respondent is irrelevant to the present complaint because the form containing that information is completed only after a settlement has been ratified. Although Mr. Levis questioned the relevance of the events which occurred after the filing of the complaint (as set forth in paragraphs 12 and 13 of the agreed statement of facts), he confirmed their accuracy and submitted that they also demonstrated that the respondent has not reneged on its original proposals and has continued to bargain in good faith and make every reasonable effort to make a collective agreement.

5. It is well established in the Board's jurisprudence that the employer's section 15 bargaining duty includes an obligation to comply with a request (by a union which holds bargaining rights for its employees) for information concerning matters such as existing wage rates and classifications. As indicated by the Board in *DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. March 49, at paragraph 15, one of the principal functions of the duty described in section 15 of the Act is to foster rational, informed discussion. In that case, at its first bargaining session with the employer, the complainant trade union asked to be provided with the existing wage rates and classifications of the bargaining unit employees. In finding the employer's refusal to provide that information to be a breach of what is now section 15 of the Act, the Board wrote (at paragraph 16):

... Of additional concern is the respondent's failure to respond to the complainant's request at this first meeting for existing wage and classification information. Particularly in first agreements situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until this information is provided to a trade union and thus this aspect of the duty supports its production. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. *It is patently silly to have a trade union in the dark with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit.* Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment. (For the American experience in this area see *J. H. Allison & Co.* (1946) 70 NLRB 377; *Whittin Machine Works* (1954), 217 F. 2d 593 (4th Cir.); *Aluminium Ore Co.* (1942), 131 F. Cir. [sic]; *Yanman & Erbe Manufacturing Co.* (1951) 181 F. 2d 947 (2nd Cir.); *Truitt Manufacturing Co.* (1954) 110 NLRB 856; and see generally Bortosic and Hartley, [*The Employer's Duty to Supply Information to the Union: A Study of Interplay and Judicial Rationalization* (1972), 58 Cornell L. Rev. 23].) Further, in the facts at hand, we have no doubt, when the totality of the respondent's conduct is considered, that the 'bad faith' aspect of the duty also effectively characterizes the respondent's failure in this regard. But, as noted above, a finding of bad faith is not a prerequisite to a finding that section 14 [now section 15] has been violated.

[emphasis added]

See also *The Windsor Star*, [1983] OLRB Rep. Dec. 2147; *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138; and *Fruehauf Trailer Co. of Canada Ltd.*, [1975] OLRB Rep. Jan. 77. Although requests for such information most frequently arise in first agreement situations, the obligation to provide information necessary for the appraisal of an employer's proposal is not limited to such situations. See, for example, *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303, in which the Board, after quoting the passage from the *DeVilbiss* case set forth above, wrote as follows (in paragraph 19):

Although [the *DeVilbiss*] case involved a demand for wage information at the outset of collective bargaining in a first agreement situation, production of such data may also be required in other circumstances. As observed by the British Columbia Labour Relations Board in *Noranda Metal Industries Limited*, [1975] 1 Can. LRB 145, at 162, [o]ne would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making 'every reasonable effort to conclude a collective agreement'.

20. In the instant case, each of the employers' offers with respect to wage increases has been formulated as a specified percentage increase over existing rates. Thus, it appears that the Union will not be in a position to accurately appraise the actual value of those offers without knowing what the employees' existing rates actually are. . . .

21. Accordingly, the majority hereby confirms its earlier finding that the respondents contravened section 15 of the Act in the circumstances of this case by refusing to disclose to the Union the actual wage rates (including piecework rates) which their respective bargaining unit employees were receiving prior to the strike.

6. Similarly, in the circumstances of the present case, it is evident that the complainant will not be in a position to meaningfully appraise the respondent's proposal of a total compensation package of 5% in accordance with the provincial guidelines without the information requested in its letter of October 15, 1984. The respondent did not dispute the complainant's contention that the 5% increase envisioned by the provincial guidelines is calculated on the basis of total compensation including salaries, wages, benefits and perquisites. Under the circumstances, we are unanimously of the view that the respondent is entitled to the information specified in sub-paragraphs (1) and (2) of paragraph 2 of our decision dated March 29, 1985 in this matter, in order to meaningfully assess the value of the respondent's proposal. As the Board stated in *DeVilbiss, supra*, [i]t is patently silly to have a trade union 'in the dark' with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit. (This approach is also supported by the jurisprudence of the National Labour Relations Board: see, for example, *Phelps Dodge Copper Products Corp.* (1952), 31 LRRM 1072; *John S. Swift Co.* (1959), 44 LRRM 1388; *Sylvania Electric Products, Inc.* (1960), 46 LRRM 1227; *Sylvania Electric Products, Inc.* (1965), 60 LRRM 1179; *Cone Mills Corp.* (1968), 67 LRRM 1241; *International Association of Machinists and Aerospace Workers, AFL-CIO and Franklin W. Nix and IAM Representatives Association* (1968), 172 NLRB 2086; and *Borden Inc.* (1978), 98 LRRM 1098.) The undesirability of that situation is not reduced or eliminated by the fact that a bargaining impasse between the present parties in respect of the bargaining unit in question will be resolved by interest arbitration rather than by resort to economic sanctions. The fact remains that the provision of such information is essential to a meaningful and intelligent assessment of the employer's offer.

7. The complainant is not, however, entitled to all of the information which it requested at the hearing of this matter, as its requests at the hearing included information which had not been requested from the respondent prior to the filing of the present complaint. Thus, our order of March 29, 1985 was limited to necessary information which the complainant had requested from the respondent prior to filing the instant complaint, and did not include information which had not been so requested, such as bereavement leave and sick leave usage rates, and the Amethyst House sleep over usage rate.

8. For the foregoing reasons, the Board hereby confirms its decision of March 29, 1985 in this matter, and the order contained in that decision.

2133-84-R United Brotherhood of Carpenters and Joiners of America, Local 1190, Applicant, v. Karl Thier Construction Limited and **Penka Carpentry Limited**, Respondents

Related Employer – Employer prevented from obtaining work from contractor because of latter's collective agreement requirement of union affiliation – New company set up to circumvent problem – Whether employer and new company related activities – Common key man – Common management and centralized control of labour relations – Arrangement undermining union's bargaining rights – Declaration issued

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *F. W. Murray* and *C. A. Ballentine*.

APPEARANCES: *David McKee* and *Tony Iannuzzi* for the applicant; *Alex Zankl* for the respondent Penka Carpentry Limited; *Karl Thier* for the respondent Karl Thier Construction Limited.

DECISION OF THE BOARD; May 2, 1985

1. This is an application under section 1(4) of the *Labour Relations Act* in which the applicant has requested that the Board treat Karl Thier Construction Limited and Penka Carpentry Limited as one employer for the purposes of the Act. For ease of reference, Karl Thier Construction Limited will be referred to as (KTC) and Penka Carpentry Limited will be referred to as (Penka).

2. The findings of fact set out in this decision are from the evidence of Karl Thier and Alex Zankl who testified on behalf of the respondents. No one testified on behalf of the applicant.

3. KTC was incorporated in 1973. KTC is owned by Thier. He and his wife are the only directors and officers. Thier runs the business and his wife keeps KTC's books. KTC carries on business as a house framing contractor and, prior to becoming incorporated, it operated as an unincorporated business in the name of Karl Thier Construction. For approximately nine years, until February, 1984, KTC's house framing work came almost exclusively from Bramalea Limited (Bramalea). Prior to performing house framing construction under contract from Bramalea, KTC and its unincorporated predecessor had performed similar work under contract from George Wimpey Limited. During the latter part of 1960, Karl Thier Construction had done some work for a house contracting company owned by Zankl and during approximately the two years proceeding this application, Zankl had done some house framing for KTC. With those exceptions, neither Thier nor Zankl had done business together to any significant degree. Zankl is Thier's uncle.

4. In December, 1982, KTC became bound to a collective agreement with the applicant and currently is bound to a collective agreement which expires April 30, 1985.

5. After February, 1984, KTC ceased getting contracts for house framing construction from Bramalea. Thier believes that this state of affairs resulted from Bramalea coming under

a collective bargaining obligation to sub-contract work only to contractors who were in a collective bargaining relationship with a particular trade union. That union was not the applicant.

6. When Thier approached Zankl with the news that KTC was no longer able to get contracts from Bramalea, Zankl agreed to form a company for the purpose of obtaining jobs from Bramalea on condition that Thier would run any jobs obtained for the new company. Zankl was semi-retired at the time from his own house building business and was not interested in running a new business full time and if Thier was not available to do what was necessary to run jobs, Zankl would not carry on the new business. Penka was formed on April 26, 1984 with Zankl as the sole owner.

7. Penka was invited subsequently to take on a contract from Bramalea for work to be done at a stated price per square foot. Thier advised Zankl that the work described in the contract could not be done at that price and he worked out for Zankl a price at which he thought the work could be done profitably. Zankl accepted that advice, made a counter proposal to Bramalea which was accepted. Thier did Penka's hiring, decided who would get piece work sub-contracts and provided the day by day supervision of the work. Two of the persons whom he hired for Penka had previously worked for KTC. Thier also operated on Penka's projects a fork truck which was owned by KTC. Thier was being paid approximately one thousand dollars per month by Penka but it is clear from his evidence that he would not receive that much if the margin left over after Penka had satisfied its expenses was less than that amount. It was also agreed between Zankl and Thier that they would share equally in any profit remaining after completing the contract.

8. Section 1(4) of the Act provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

It may be seen from the wording of the section that there are three conditions which must be met before the section has application. These are:

- (1) there must be more than one corporation, firm, syndicate, association or individual;
- (2) those entities must be under common control or direction; and,
- (3) they must be engaged in associated or related businesses or activities.

The first condition is easily met on the facts of this case since there are two corporate entities: Karl Thier Construction Limited and Penka Carpentry Limited. With respect to whether they are carrying on associated or related businesses or activities, the Board has described what constitutes related or associated businesses or activities in the following terms in its decision in *Brant Erecting* [1980] OLRB Rep. July 945, at paragraph 15:

15. . . .

The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are 'related' or 'associated' because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principles. If these criteria are met, two businesses may be 'related' within the meaning of section 1(4) even though their activities are carried on through different corporate vehicles and are not carried on simultaneously.

KTC has operated as a corporate entity since 1973 although it has not undertaken any business contracts since February, 1984. Penka was incorporated on April 26, 1984. It has been doing precisely the same kind of work for the same developer from which KTC previously had received virtually all of its business for the past nine years. Penka is not only utilizing the same employee skills to perform this work, two of the persons hired for Penka by Thier had previously worked for KTC. There can be no doubt on those facts that the criteria referred to in the *Brant* decision, *supra* are met here. Therefore, the Board finds that KTC and Penka are carrying on related activities or businesses within the meaning of section 1(4) of the Act.

9. The remaining question is whether the two respondents are under common direction or control. The two companies are separately owned. Thier is the sole owner of KTC and Zankl is the sole owner of Penka. Thier and his wife are the sole directors and officers of KTC. Thier runs the business and his wife keeps the books. There is no evidence respecting the directors and officers of Penka and there is no evidence that there are any directors or officers common to both corporations. Although those factors point towards a conclusion that KTC and Penka are not under common direction or control, there are several other factors which point in the opposite direction. KTC's and Penka's day-to-day operations were under common management, that of Thier. He supervised the jobs, hired the employees, decided who was going to get the piece work sub-contracts and made sure the work which needed to be done got done. Thier did all of these things for KTC as well. To that extent, then, not only are the two corporations under common management, it can be said also that there is centralized control of their employee or labour relations through Thier. The two corporations also share in the use of a lift truck owned by KTC and operated on Penka's projects by Thier.

10. It may be readily inferred from the evidence that it was Thier's business association with Bramalea which gave Penka an entry into house framing contracting with that developer and it was Thier's knowledge and advice which determined the prices at which Penka accepted a contract from Bramalea. Zankl was semi-retired when Thier approached him about going into business with the objective of getting house framing contracts from Bramalea. It is clear that Zankl would not have created a new corporate entity to go into a new business venture were it not for the fact that he would have available to that venture Thier's business know-how and management capability with respect to house framing construction. In other words, but for Thier, Penka would not have been incorporated. Nor would Zankl continue to operate Penka if Thier was not available to do all of these things. Thier was the key man in Penka's operation just as he was in KTC.

11. Thier also stands to receive the greater financial benefit from Penka's venture. He was receiving one thousand dollars per month as long as Penka could afford it and he was to share equally with Zankl in any profit remaining after the contract with Bramalea was completed.

12. In these circumstances, the Board is satisfied that KTC and Penka are under common control or direction within the meaning of section 1(4) of the Act.

13. Thus the three statutory pre-conditions for a declaration to be made under section 1(4) of the Act have been met. Even so, the Board retains the discretion whether to treat KTC and Penka as a single employer for purposes of the Act. A key purpose of section 1(4) is to protect a trade union's bargaining rights. In this case, the applicant has bargaining rights with KTC. KTC has stopped getting business contracts from Bramalea, the source of virtually all of KTC's business for the past nine years. Instead of seeking other sources of work for KTC, Thier went in search of another vehicle for obtaining business from Bramalea, the same source from which his own corporate entity had been deriving its business. This was not simply a decision to cease running his own business to take employment supervising someone else's construction jobs. Clearly Penka would not have been formed but for Thier's objective of being able to continue to get work from Bramalea and his preparedness to assist Zankl in getting contracts from Bramalea for Penka and doing everything necessary to carry out those contracts. Penka was formed and Thier entered into this arrangement with Zankl because, correctly or not, Thier believed that KTC's collective bargaining obligation to the applicant stood in the way of KTC getting further contracts from Bramalea. Penka was formed to enable KTC to escape its obligation and to overcome that perceived obstacle to doing business with Bramalea. Thus the arrangement Thier made to enable Penka to acquire and execute house framing contracts with Bramalea has undermined the applicant's bargaining rights for employees of KTC. The Board is satisfied that a declaration in these circumstances to treat KTC and Penka as a single employer would protect those rights.

14. In summary and for the foregoing reasons, the Board finds Karl Thier Construction Limited and Penka Carpentry Limited to be associated or related businesses under common control or direction and declares that they be treated as constituting one employer for the purposes of the *Labour Relations Act*. The Board further declares that Penka Carpentry Limited is bound to the collective agreement between Karl Thier Construction Limited and the applicant.

2340-84-U Michael Ross, Complainant, v. NTN Bearing Mfg Canada, Ltd. and United Steelworkers of America, Respondents, v. Klaus Hatje, Intervener

Adjournment – Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Preliminary ruling refusing to hear parts of complaint – Request for adjournment to retain council made subsequently refused – Whether manner of representing re discharge grievance breach of representation duty

BEFORE: *Paula Knopf*, Vice-Chairman.

APPEARANCES: *Michael Ross* for the complainant; *Keith Oleksiuk* and *George Teal* for the respondent union; *Antone Gregorio* and *Tom Patterson* for the respondent company and the intervener.

DECISION OF THE BOARD; May 27, 1985

1. The name of the respondent company is amended to read NTN Bearing Mfg Canada, Ltd.

2. This is a complaint under section 68 of the *Labour Relations Act*. The complainant alleges that the Union has breached its duty of representation by failing to represent him in the grievance of his discharge and several other matters.

Preliminary Matters

3. Before dealing with the merits of the case, several preliminary matters should be addressed. At the outset of the hearing, the complainant was asked by the Board to list the particulars of his complaint. He listed the following incidences where he says the Union has violated section 68 of the Act:

- (1) January, 1984 – the discharge grievance was not processed through to arbitration.
- (2) July 19, 1982 – he was spoken to rudely by a Union official and told how to process a complaint against that official.
- (3) September 29, 1982 – he was spoken to rudely by the Company's president in the presence of a Union representative.
- (4) 1982 – he failed in obtaining a job after a competition which he said was discriminatory and the Union took no action on his behalf.
- (5) November 7, 1983 – he sought the assistance of the Union but was intimidated by their members.
- (6) The Union failed to respond on the following grievances:

- I August 12, 1981, Grievance No. 59 – denial of Union representation by a foreman
 - II August 25, 1983 – Grievance No. 83-5, discrimination in testing for a job
 - III Grievance No. 83-11, telephone safety
 - IV December 15, 1983 – Grievance No. 83-22, unjust suspension
 - V January 10, 1984 – Grievance No. 8401, foreman doing bargaining work and harassment
 - VI January 24, 1984 – Grievance No. 84-03, unjust dismissal.
- (7) Mass corruption between the Union and the Company at all levels.

4. After this list was presented, the respondent Union objected and submitted that the Board should exercise its discretion to decline to hear most of the items because of the delay in bringing the complaints forward. Further, the Union submitted that several of the complaints do not fall within the scope of section 68. The complainant responded to these submissions by pointing out that he would be equally prejudiced by the delay. He explained the delay by saying that the events seemed like nothing at the time. I turned to God. It was only when I lost my job that I realized I had to do something. He also said he wanted to use the past incidents to prove later ones.

5. In considering the question of delay, the Board had in mind its policies and considerations set out in *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, paragraphs 20, 21 and 22.

6. The Board issued a ruling at the hearing that the complainant could not proceed with the following portions of his complaint for the reasons stated:

- (1) July 19, 1982 – this does not fall within section 68 as it does not deal with the duty of representation. Further, too much time has passed since the event.
- (2) September 29, 1982 – this does not fall within section 68. Further, too much time has passed since the event.
- (3) 1983 job competition – too much time has passed since the event. Further, no notice had been given to the incumbent.
- (4) November 7, 1983 – too much time has passed since this event.
- (5) Too much time has passed since the following grievances:

August 12, 1981 – No. 59

April 25, 1983 – No. 83-5

October 9, 1983 – No. 83-17

October 17, 1983 – No. 83-11

December 15, 1983 – No. 83-22

- (6) “Corruption” – this was too vague an allegation and insufficient in particulars to fairly enable a response to be formed against it. Further, it did not appear, *prima facie*, to fall within the scope of section 68.

The Board indicated to the parties that it was willing to hear and proceed with the hearing of all the events relating to the grievance of January 10, 1984, being Grievance No. 84-01, as well as the events surrounding the Union's conduct over the complainant's discharge in January, 1984.

7. After this ruling was made, the complainant had asked that the case be adjourned to enable him to obtain counsel and witnesses. Up to that point the complainant had been unrepresented. He had been asked by the Board at the outset of the hearing whether he wished to appear on his own behalf and he indicated at that time that that was his desire. However, after the preliminary ruling, the complainant indicated his discomfort with the proceedings and stated that he had not expected to be opposed by two lawyers. He also indicated that he had previously acceded to the respondent's request for an adjournment and thus expected reciprocal courtesy at this time. Counsel for the respondents and the intervener both opposed the adjournment for the same reasons. They both indicated that they would have consented had the request been made before the day of the hearing. However, once the hearing was underway, their clients would be severely inconvenienced and financially affected by an adjournment. The Board asked the parties to try to resolve the request for the adjournment amongst themselves and recessed to allow such attempts to be made with the assistance of a Labour Relations Officer. However, the parties were unable to reach a mutually satisfactory arrangement. Thus, the Board was forced to make a ruling on this matter.

8. The Board is sensitive to the difficulties a layman has in attempting to present a case against two experienced lawyers in the formal context of a hearing. However, the responsibility of the Board is to ensure fairness to all parties. In a case like this, the ongoing relations of the parties are strained by such a case hanging over their heads. It benefits no one to have delays in these cases. Further, the parties are notified well in advance of the hearing date to enable them to prepare to gather together the proof of their case. Unless compelling reasons can be given, the Board is loathe to adjourn a case in its midst. The Divisional Court has said of this Board . . . a party who has adequate notice of the hearing does not have the right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative (*Flamboro Downs Holdings and Teamsters Local 1879* (1979) 24 O.R. (2d) 400 (Ont. Div. Ct.)). The parties must be expected to come to the hearing with all their available evidence and with a representative if one is desired. An impossible situation will result if a party could obtain an adjournment once she/he realized the nature of these proceedings. In this case, the complainant did not indicate any reason why he had not previously obtained counsel or subpoenaed witnesses. Because of this, and because of the tremendous inconvenience that would result to the other parties and their many witnesses, no circumstances were put before the Board to warrant an adjournment. By way of hindsight, this Board is able to note that the complainant was able to present his case

clearly and effectively. Further, the witnesses he mentioned that he would have wanted for his own case were called by the respondent Union. Thus, the complainant had the opportunity to adduce evidence from those witnesses on his own behalf through cross-examination.

The Facts

9. The complainant testified on his own behalf. He explained that he was working the night shift on January 21, 1984. He was working on a packing job when he realized that he had run out of boxes. He and his lead hand, Terry Coote, went looking for boxes in an upstairs area. While looking for the boxes, Mr. Coote pointed to a cubbyhole and said that someone was sleeping there and that they would find out that night who it was. Later, the complainant saw Klaus Hatje, the Production Manager on the premises. This was unusual during the night shift. The complainant's curiosity was peaked when he was in the lunchroom around 4:00 a.m. sitting with Chris Anderson, the Union Steward, when Mr. Coote came over and told Mr. Anderson that Mr. Hatje wanted to see him. The complainant followed Mr. Anderson and Mr. Coote out towards the floor although Mr. Coote had indicated to him that he need not come along.

10. When Mr. Hatje was talking to Mr. Coote and Mr. Anderson, the complainant says he decided that that would be a good opportunity to see what Mr. Hatje was concerned about. He went up the ladder towards the cubbyhole and saw Peter Crouse lying in the cubbyhole. He roused Mr. Crouse and told him that Mr. Hatje was downstairs. The complainant says he doesn't know whether Mr. Crouse was sleeping or not but that he rubbed his eyes and that they both went down the ladder. At that point Mr. Crouse was confronted by Mr. Hatje. The complainant recalls Mr. Crouse indicating to Mr. Hatje that Mr. Crouse had had a lot of problems with his wife. The complainant says he felt sorry for Mr. Crouse and testified that he told the men around there simply that he would be a witness for Mr. Crouse. At the same time, the complainant was concerned that the Company may be trying to fire him or build up a case around him. However, Mr. Crouse was told to go home and the complainant was told to return to work.

11. The following day, the complainant returned to work but was injured in the course of his work and has been off work on disability since then. However, on Monday, January 23rd, the complainant and Mr. Crouse were both notified that they were terminated from the Company. A grievance was filed immediately.

12. On February 2, 1984, a third step meeting was held between representatives of the Company and the Union to discuss the grievance of Mr. Crouse and the complainant. For the first time the complainant was given the reasons for his termination. The following reasons were given:

- A. That Mike Ross threatened a fellow employee, Bob Sales, with bodily harm and death without provocation on or about Mar. 11, 1983 in the plant. A written disciplinary notice was given and copies of a written report of the incident, the disciplinary notice and Mr. Sales written complaint are in the personnel file.
- B. That during a meeting in the Company boardroom in June of 1982 Mike Ross threatened Jim Watson with a knife and Messrs. Jim

Watson, Richard Chung and Mike Currie with retaliation for alleged acts of discrimination. A written report of the incident is included in his personnel file.

- C. That in September 1982 Mike Ross threatened and harassed Mark Steffler for not substantiating an allegation against Jim Watson. A written report of Mr. Steffler's complaint is in his personnel file.
- D. That in December 1983 Mike Ross threatened and harassed Lcuis Yeuong without provocation. Mr. Yeuong lodged a verbal complaint at that time and a report of the complaint is in his personnel file.
- E. That on Aug. 27, 1982 Mike Ross in the course of working as a Grinding Operator committed a gross act of negligence by improperly grinding 6202UN rings instead of SCO228UN rings. The rings had to be reworked at a substantial cost to the Company. A written warning was given and a copy is in his personnel file.
- F. That in [sic] December 5, 1983 Mike Ross in the course of working as a Grinding Operator committed a gross act of negligence by improperly grinding 20,130 6202 outer rings to the wrong dimensional standards. The cost to the Company as damages amounted to \$6,000.00. A written warning was given and a three (3) day suspension was imposed.
- G. That on Jan. 10, 1984 while working as an Assembly Operator Mike Ross refused to perform work assigned by his Production Foreman, Mr. Glen McLaren and acted insubordinately to Mr. McLaren. A verbal warning was given and a copy of Mr. McLaren's report is in his personnel file.
- H. That on January 21, 1984 Mr. Klaus Hatje, the Production Manager saw Peter Crouse sleeping in the Mezzanine storage area. This was at a time when Mr. Crouse was supposed to be working as a Technician. Mr. Hatje met with Terry Coote and Chris Anderson in the Shipping area and while explaining the sleeping incident to them, observed Mike Ross who was in the vicinity, disappear from view. A few moments later Mike Ross was seen descending a Mezzanine ladder, not normally used by employees, after Peter Crouse and was heard saying to Mr. Crouse Don't worry Peter, I'll back you up, I saw you up there looking for dividers. At our Step 3 Meeting, when asked why he had gone to the Mezzanine, Mr. Ross stated he had previously observed Mr. Hatje descending the ladder. When Peter Crouse was interviewed at the scene he said he was sleeping on the job because he was ill. Mr. Ross's statement to Mr. Crouse was a deliberate attempt to cover up for Mr. Crouse. His act amounted [sic] to an attempt to defraud the Company in it's (sic) investigation of a rule violation and was intentional.

13. The evidence of the complainant was that nobody argued any point that the Company was trying to make against me. . . . They might as well have never had the meeting. Nothing was said on my behalf. They should have given me a chance to explain. They didn't represent me. Because the Company knew how the Union felt about me, they went ahead and overstepped the boundary.

14. The complainant further complained about the Union's conduct at the meeting of March 4, 1984. This was a meeting held by the Union to determine whether the case ought to be processed to arbitration when the Company continued to refuse to reinstate the complainant. At the Union meeting, the complainant admits that he was given an opportunity to state his case before the membership. The complainant says that he was sent out of the room when George Teal and Ron Sheldon made submissions as to what directions the Union should take regarding his case. He said Mr. Crouse was also sent out at that time. However, he was called in to discover the result of the vote and was told that the membership had voted not to process his case to arbitration. He then says that he asked George Teal for advice. Mr. Teal was the Union's Staff Representative for that area. The complainant says that Mr. Teal said that he had no advice for him.

15. Regarding the January 10, 1984 grievance, the complainant says this involved his foreman's usurpation of his bargaining unit job by pulling out a retainer pool and replacing it. The complainant had lodged a grievance regarding this. The complainant alleges that the Union failed to process the grievance to receive a favourable or acceptable answer to the complainant. The complainant says he did not pursue the grievance any further himself because I thought it was in my best interest at the time. I didn't realize what was happening.

16. In short, the complainant says that the Union discriminated against him by taking Mr. Crouse's case to arbitration but failing to take his own and that it acted in violation of the Act by failing to process the January 10, 1984 grievance to his satisfaction.

17. The Union called two witnesses to respond to the complainant's allegation. The first witness was Chris Anderson. He was present when the complainant and Mr. Crouse were confronted by management, Mr. Coote was present at Mr. Hatje's request because Mr. Hatje suspected someone sleeping on the job and wanted Mr. Coote, as the Union Representative, to be a witness. Mr. Anderson recalls the complainant following behind him, Mr. Coote and Mr. Hatje. However, when they came to the area of the latter, Mr. Ross separated from them. While the three were still talking, Mr. Crouse and the complainant came down the back ladder a few minutes later. Mr. Hatje confronted Mr. Crouse immediately and asked him if he was sleeping. Mr. Anderson says that Mr. Crouse responded by saying that he was tired, that he was not feeling well and was on medication and so was taking a little bit of a nap. At this point, Mr. Anderson says that the complainant stated that he would be a witness for Mr. Crouse to testify that he wasn't sleeping on the job and that he had seen Mr. Crouse going upstairs to get paper for the packing machine. Mr. Anderson says that Mr. Ross kept reiterating that he would be a witness for Mr. Crouse.

18. Mr. Anderson also testified regarding the January, 10, 1984 grievance. His recollection of the grievance was that a settlement was reached at Step 2 or 3 when the Company agreed that management would not do bargaining unit work on the floor. The Union considered this outcome satisfactory and did not pursue the grievance further.

19. George Teal also testified on behalf of the Union. He first explained what efforts were made on behalf of Mr. Crouse at the Step 3 grievance meeting with the Company. After relating this, he explained what he says happened at a similar meeting for the complainant. Mr. Teal said that at the outset they did not know why the complainant had been fired and they asked for the reasons to be given. That was when the list cited above in paragraph 12 was given to the Union. The Company indicated that they could not put up with him any longer. Further, the Company considered the complainant's willingness to lie on behalf of Mr. Crouse to be a culminating incident on January the 24th. Further, several members of the bargaining unit had come to management and asked that something be done about the complainant as a result of the incidents mentioned above. Mr. Teal says that he told the Company that even if they had established a culminating incident, they were not treating the complainant properly. The record showed warnings being given after suspensions and Mr. Teal says that he felt that the Company couldn't flop all over the place with regard to discipline. Mr. Teal says he also discussed the complainant's workmanship with the Company at the meeting and that the Company admitted that the grievor was a good worker. However, one member of management said that he could not have lying taking place in the work place. Mr. Teal says that he then asked the Company to consider reinstating the complainant. He says he felt the culminating incident would not hold up at an arbitration and thus asked for reinstatement. However, one week later, the Union was notified that the Company was not willing to reinstate the grievor.

20. Mr. Teal then explained that the complainant was sent a registered letter advising him of the Union meeting on March the 4th wherein his case would be considered for arbitration. It is interesting to note the similarities and differences in treatment given to Mr. Crouse's case as compared to the complainant's case at this meeting according to Mr. Teal. He explained that Mr. Crouse's case was taken first. The Local President read out the charges against Mr. Crouse. Mr. Crouse then told the members what had happened. The Executive made no recommendation as to whether to take the case to arbitration or not but indicated it would be left to the membership. At that point Mr. Crouse was asked to leave the room. The members in the room then asked Mr. Teal what he felt the chances were in the grievance. He told the membership that he felt that the case could be won but he didn't want to give any false hopes. He estimated the chances to be 50/50 or maybe better because Mr. Crouse had a good record. A vote was then held and the members voted 27 to 7 to send it to arbitration. Mr. Crouse was brought back into the room and told the results of the vote.

21. The membership then considered the complainant's case. Again, the President explained why the complainant was discharged. The complainant was asked to explain his situation. Mr. Teal says that he told the membership that he had been willing to be a witness for Mr. Crouse and was willing to say Mr. Crouse was not sleeping. The complainant continued by asking the members to support him but indicated to them that he believed that they would not support him because he was black. At that stage one of the members asked what a culminating incident is and Mr. Teal explained that it is when the Company builds up a case against a member. The complainant was then asked to leave the room. Again, the members asked Mr. Teal what his feelings were regarding this case. He told them that he did not feel that the Company could prove a culminating incident. But if they did, a sympathetic arbitrator would probably reinstate the complainant with a suspension because of the complainant's record. Mr. Teal indicated that he felt the incident of waking Mr. Crouse up would not justify a discharge. He also says that he asked the members to vote on the incident and not on the colour of the complainant. The members then voted 12 to 16 against sending

the case to arbitration. The complainant was invited back into the room and advised of the results of the vote.

22. After the meeting, the complainant approached Mr. Teal in his office to ask what the Union now intended to do about his case. Mr. Teal says that he told the complainant that there was nothing more he or the Union could do now that the Local had voted. Mr. Teal says that he told the complainant that he could take the case further to his supervisor, Douglas Hart, or the the District Director, Dave Patterson. Further, he could take the case to other places such as the Labour Board, but that that would be his choice. The complainant denies this.

23. Finally, Mr. Teal explained that members are asked to leave the room during the vote on all cases like this because the votes are not held by secret ballot and it is felt that members would be intimidated in their vote if they felt the person concerned saw the vote. Thus, the subjects of the votes are always asked to leave the room during the vote. Further, it is not the Union's policy to release the vote count so that no member will be embarrassed.

24. The intervener called the Production Manager, Klaus Hatje, to testify. He explained the events of the early morning hours of January the 21st. Essentially, his story is completely consistent with that of Mr. Anderson on all relevant matters. The Board questioned him as to Mr. Teal's conduct on the complainant's behalf at the Step 3 grievance meeting in February of 1984. Mr. Hatje said that Mr. Teal argued as he usually does. He tried to minimize the scope of certain points. He went through every item, item by item. He tried to convince the Company that we should ignore certain items, that they should be expired. He asked the Company to take the dismissal back. He pushed hard to get the Company to retract the dismissal. Mr. Hatje estimates that the grievance meeting lasted approximately two hours.

25. In assessing all this evidence, this Board has to decide what evidence to rely upon where there is a conflict. While there were a number of minor factual conflicts between the complainant and the respondent's witnesses, the essential and relevant conflicts arise with regard to Mr. Teal's conduct at the Step 3 grievance meeting and the events of the Union meeting on March the 4th, and the meeting with Mr. Teal and Mr. Ross immediately thereafter. The Board must conclude that, having regard to the demeanour of the witnesses, their ability to recall, the internal consistency of the stories, and the consistency of the testimony given on behalf of the respondents and the intervener, the evidence of Messrs. Anderson, Teal and Hatje must be accepted over that of the complainant wherever there is a conflict.

The Decision

26. In order for this complaint to succeed, the onus is on the complainant to establish on the balance of probability that the trade union acted in a manner that was arbitrary, discriminatory or in bad faith and thus contrary to section 68 of the Act. Section 68 states as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members

of the trade union or of any constituent union of the council of trade unions, as the case may be.

The function of the Board in determining whether section 68 has been violated is not to second guess the Union or substitute the Board's opinion as to what the Union ought to have done. The function of the Board has been set out in *Ford Motor Co. of Canada*, [1973] OLRB Rep. Oct. 519:

This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measure and solutions that have gained acceptance within that community.

27. In order to find arbitrariness, this Board would have to conclude that the Union failed to direct its mind to the merits of the complainant's grievances or failed to enquire into or act upon available evidence or conduct any meaningful investigation to obtain the information to justify its decision. Alternatively, arbitrariness could be established if the complainant could show that the Union acted on the basis of irrelevant factors or principles or displayed an attitude that was indifferent, capricious or non-caring towards the complainant. (See *I.T.E. Industries Limited*, [1980] OLRB Rep. July, 1001.)

28. To show bad faith, the complainant would have to establish hostility, ill will, dishonest dealing, an attempt to deceive or a refusal to process the grievances for sinister purposes. (See *Chrysler Canada Ltd.* [1979] OLRB Rep. July 618.)

29. The Board has set out the test for discrimination in *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143 as follows:

The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for doing so. To avoid acting in a manner that is discriminatory, the union requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

30. With this background, we can now turn to the merits of the case. We shall deal first with the Union's conduct with regard to the complainant's discharge. The complainant's chief concern seems to be that the Union decided to take the case on behalf of Mr. Crouse to arbitration but denied the complainant the chance to go to arbitration. The complainant feels that this decision is discriminatory and arbitrary. However, the evidence establishes that, in arriving at this decision, the Union considered the statements made by the complainant, the allegations made by the Company, and Mr. Teal's explanation of the complainant's record and his chances of success at arbitration. It is to be remembered that Mr. Teal indicated his belief that an arbitration for the complainant would partially succeed and would likely result in the complainant being reinstated. Mr. Teal's advice was given with the benefit of his many years of experience in the field and, it can be said, that his assessment of the case was probably very accurate. However, despite this, the democratic process of the Union resulted in the

decision not to proceed with arbitration. There is no evidence that this was motivated by bad faith or dishonesty or ill will. If that was the case, there is simply no evidence of that before this Board. The decision cannot be considered to be arbitrary because it was based upon a full consideration of all the factors of the case. While the complainant was treated differently than Mr. Crouse, it cannot be said that his situation was completely identical to that of Mr. Crouse in that their past records were quite different. Thus, there can be seen a logical and objective reason why the two cases were treated differently by the membership of the Union. As a result of this, this Board cannot conclude that the Union acted contrary to section 68 in deciding not to process the case to arbitration.

31. Working back from this, we must also examine the Union's conduct at the Step 3 grievance meeting. Although the complainant has the belief that nothing was done for him at that meeting, he did admit in cross-examination that something was said on his behalf by Mr. Teal. However, the evidence of Mr. Teal and Mr. Hatje convinced the Board that a great deal was done on behalf of the grievor at that meeting. Mr. Teal raised all the issues that one would expect of a responsible advocate at such a meeting on behalf of the complainant. Thus, it must be concluded that the complainant was fully and fairly represented at the Step 3 meeting by his Union.

32. Regarding the grievance of January the 10th, the complainant feels that the Union has not fulfilled its duty and that it did not process the case for him. However, the evidence of Mr. Anderson and Mr. Hatje indicates that the grievance was resolved by management agreeing not to allow foremen to do bargaining unit work. This would have seemed to have been the purpose of the grievance in the first place. The Board fails to see what more the complainant could have wanted from the grievance and certainly, the complainant did not indicate anything further himself. It is in the interests of industrial relations that grievances be settled early and as expeditiously as possible. As a matter of good judgment and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. (See *Catherine Syme*, [1983] OLRB Rep. May 775.) Since the purpose of this grievance was to notify the Company of the complainant's objection to management doing bargaining unit work, and since the result of the grievance was that management agreed to cease that practice at an early stage in the grievance procedure, we must conclude that the Union acted properly in settling the grievance with that agreement at the early stages. Thus, no violation of section 68 has been established.

33. Further, the complainant suggests that Mr. Teal's conduct after the Union meeting amounts to a violation of the Act. The complainant suggests that Mr. Teal's refusal to give him any advice as to what to do after the membership turned down the bid to go to arbitration is a failure in the Union's duty to properly represent him. As indicated above, the Board has concluded that Mr. Teal's evidence must be accepted over that of the complainant in the event of conflict. Thus, the Board must conclude as a matter of fact that Mr. Teal did indeed give the complainant advice as to what steps were available to him after the Union decided not to take his case to arbitration. Mr. Teal advised the complainant to approach Mr. Teal's superior or this Board. Whether or not a Union has a duty to advise a member as to his rights when the Union has decided not to champion those rights is an interesting question that need not be decided in this case because of the facts of the situation. But because the facts establish that Mr. Teal did indeed give the complainant the advice that he sought, there can be no finding of a violation of section 68 in this regard.

34. In closing, the Board feels compelled to comment on the sympathy it has for the complainant. The complainant had four years' seniority with the Company. One day before his termination, he was disabled by an industrial accident which still prevents him from obtaining gainful employment. His termination was prompted by his misguided attempts to assist a brother Union member. One can easily sympathize with his bewilderment and sense of unfairness as a result of the other member's case being taken to arbitration when his was not. However, the responsibility of this Board is to enforce section 68 of the Act in this case. Since none of the acts or alleged omissions of the Union amount to violations of this section of the Act, the complaint must be dismissed.

1338-83-R United Food and Commercial Workers International Union, Local 175, Applicant, v. **Silverstein's Bakery Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Employee – Union entitled in organizing to rely on Board practice of granting separate drivers' units in bakery industry – Driver salesmen and special drivers having separate community of interest – Granted separate unit – Whether supervisors exercising managerial functions

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *W. H. Wightman* and *W. F. Rutherford*.

APPEARANCES: *Harold F. Caley* and *Frank Kelly* for the applicant; *James Hassell* and *Sonny Silverstein* for the respondent; *Orval Bartraw* for the objectors.

DECISION OF THE BOARD; May 3, 1985

1. In a decision dated December 7, 1983 (reported in [1983] OLRB Rep. Dec. 2095), another panel of the Board (with Board Member B. L. Armstrong dissenting) wrote in part as follows concerning this application for certification:

1. This is an application for certification in which the parties met with a board officer on the date set for hearing and reached agreement on the following bargaining-unit description:

All employees of the respondent at Toronto save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.

The parties then agreed to the appointment of a Board officer to receive their evidence on, *inter alia*, whether certain persons were "persons covered by a subsisting collective agreement.

2. When the parties subsequently met with the officer for the purposes of commencing the examination, however, it quickly became apparent that the parties were operating with two different views as to what persons covered by a subsisting collective agreement meant, and what, consequently, was the appropriate scope of relevant evidence before the officer. The

matter was accordingly put back on for hearing before the Board, and the submissions of the parties have now been received.

3. The applicant initially applied for a tag-end form of all-employee unit described as follows:

All employees of the respondent in its bakery at 195 McCaul St., Toronto, save and except office staff, persons covered under existing collective agreements, foremen, persons above the rank of foremen and persons regularly employed for not more than twenty-four hours per week.

The respondent has two collective agreements in force with Bakers' Union Local 181, which is not the present applicant. The first collective agreement covers the respondent's craft baking staff, and dates back several decades. The second agreement arose out of a 1981 application for certification, as a result of which the parties entered into a voluntary-recognition collective agreement covering, in broad terms, production help. That collective agreement has since been renewed, and is described in its scope as:

ARTICLE 1 - RECOGNITION

1.01. The Employer voluntarily recognizes Local 181 as the bargaining agent for all employees of Silverstein's Bakery Limited, 195 McCaul Street, Toronto, Ontario who are not covered by a classification in the present agreement with Local 181, Toronto, Ontario, save and except foremen, foreladies and drivers, and persons above the rank of foreman and foreladies and office and clerical employees.

The applicant claims that it relied on that scope clause to determine the existing unit, and organized on the basis of what was stated as the only relevant exclusion, being drivers. It is understood that term to mean those persons primarily engaged by the respondent to drive trucks, and who spend the bulk of their time on the road.

4. There are, as it turns out however, eight other persons whom the respondent asserts have, by agreement of itself and Bakers' Local 181, never been covered by the subsisting collective agreements: 6 of these individuals are described by the respondent as shipper/drivers or receiver/drivers and, according to the respondent, have driving included as a regular, though not primary, part of their duties. The other 2 are described by the respondent as shipper and packager respectively, and are said to act as drivers as required from time to time, although admittedly less frequently than the other six. . . .

7. . . .the Board is prepared in the present circumstances to permit the applicant to amend the description of the bargaining unit it seeks. Given the degree of organizing at this work place, however, it will be for the applicant to satisfy the Board that the eight persons in dispute are sufficiently distinct in their community of interest to justify their exclusion from any bargaining unit which the applicant may at this stage be granted. The terms of appointment of the officer are accordingly altered to inquire into and report to the Board on the community of interest which the aforesaid eight persons said to be presently excluded from the subsisting collective agreements share with the group of drivers whom both parties agree are in the unit. The parties will, of course, have full latitude to call any evidence relevant to the issue of community of interest. The officer shall also receive evidence as to whether the eight persons in dispute have in fact, as the respondent states, been treated by the respondent and Local 181 as not covered by the subsisting collective agreements, should the parties be unable to agree on at least that factual issue.

3. The examination process in respect of this application involved 24 meetings over a period of 19 months. (Meetings scheduled by the Board Officer on intermediate dates were adjourned by agreement of the parties.) The Board Officer's Report dated October 30, 1984 consists of over 1,000 pages of evidence. A total of 20 exhibits were also entered during the course of the examination proceedings.

4. In accordance with the procedure agreed upon by counsel for the applicant and counsel for the respondent, both counsel filed written submissions with the Board in February of 1985 and also made oral submissions at a hearing held before the present panel on March 4, 1985. Having carefully considered all of those submissions and the totality of the evidence, we have reached the conclusions set forth in the balance of this decision.

5. The respondent employs a work force of approximately 130 employees, of whom about 50 are employed in production (baking bread, rolls, and other products) and about 40 are employed in packaging and shipping. Approximately 25 of the 50 production employees are covered by the aforementioned first collective agreement, which applies to the respondent's craft baking staff. The remaining 25 are covered by the aforementioned second collective agreement, as are most of the respondent's packagers and shippers. The respondent also employs an office staff of 7 persons and approximately 30 drivers and supervisors.

6. It is clear from the evidence that none of the eight persons referred to in paragraph 4 of the Board's decision of December 7, 1983 (quoted above) has ever been treated as being covered by either of the aforementioned collective agreements. Since they are not involved in performing the craft baking work covered by the first collective agreement, they obviously do not fall within its purview. Two of the eight, namely, Feleppo Serraino and Pasquale Pontrelli, were excluded from the second collective agreement by decision of Dave Silverstein, the President of the respondent, and Sonny Silverstein, the respondent's Vice-President and General Manager, on the basis that they were long-term salaried employees. Mr. Serraino is a bread slicer who has been employed by the respondent for about 26 years. Mr. Pontrelli has been employed by the respondent as a packager and shipper since 1961. Neither of them does any driving whatsoever for the respondent. The remaining six have been treated as being excluded from the second collective agreement on the basis that their job duties include driving. (As noted above, drivers are expressly excluded from that collective agreement.) Domenico Annechiarico spends the vast majority of his working time gathering stale bread at the bakery, moving it across the road by truck to the respondent's warehouse, and unloading it there. He also spends some time parking trucks for the respondent and occasionally refuels them. Nazarali Bhimzi spends approximately the first four hours of his eight hour shift performing clerical functions (preparing load sheets and shipping sheets). He then packages and ships (i.e., gathers various products together to form a delivery load) for about an hour, after which he loads a truck for the night driver (Paul Gallop), drives stale bread to the warehouse, and moves trucks from the loading docks and from the street to a nearby parking lot. When Mr. Gallop is absent, Mr. Bhimzi does the second half of Mr. Gallop's route. (Mr. Gallop is one of the respondent's special drivers, who are paid an hourly rate rather than a commission.) Approximately twice a month he does the final call on Mr. Gallop's route when Mr. Gallop is too exhausted to do it himself. He also occasionally brings Mr. Gallop another truck when Mr. Gallop's truck breaks down while he is on his route. John Nunes spends about 95% of his working hours packaging, shipping, and receiving. He very seldom drives, as his driving is confined to emergency situations, such as when a special driver is running so late that the special driver will be unable to make a required delivery on time and no one else is available to make the delivery other than Mr. Bhimzi.

7. The remaining three persons (referred to in paragraph 4 of the Board's decision of December 7, 1983) are Brian, Jeff, and Mark Silverstein, who are the sons of Sonny Silverstein. Although they primarily work inside the bakery in the packaging and shipping areas, they occasionally fill in for drivers who are away from work due to illness or vacation.

They also sometimes make emergency deliveries when other drivers are blocked in traffic or otherwise unavailable. Brian, Jeff, and Mark each have a university degree and are in the process of learning the business with a view to future promotion. Unlike the respondent's driver-salesmen (who receive a percentage of sales from their respective routes as remuneration) and special drivers (who, as indicated above, are paid by the hour), Brian, Jeff, and Mark are paid a salary. They earn substantially more than most of the drivers whom they replace or assist. Indeed, their salaries are almost as high as those received by Sonny Silverstein and the other members of senior management. Moreover, they each receive a Christmas bonus of \$3,000, while driver-salesmen and special drivers receive only \$200. Unlike the respondent's driver-salesmen and special drivers, Brian, Jeff, and Mark rotate their working hours by taking turns reporting for work at 3:00 a.m. (while the other two begin at 7:00 a.m.). The person who reports at 3:00 a.m. directs and controls the respondent's packaging and shipping activities until a member of senior management arrives at the plant four or five hours later. Brian, Jeff, and Mark each devote a substantial majority of their working time to packaging, shipping, and other inside activities.

8. It is the Board's general practice to include drivers in an all employee production unit in most industries. However, in the dairy, bakery, and laundry industries, the Board has long recognized that outside workers (usually described as driver salesmen or driver salesmen and special delivery drivers) generally have a sufficiently distinct community of interest from other employees to make it appropriate for them to have a separate bargaining unit if they so desire. See, for example, *Borden's Dairy Limited*, [1947] OLRB Rep. Aug. 1; *Rowland & O'Brien Ltd.*, [1957] OLRB Rep. Jan. 24; *Trent Valley Bakeries*, [1957] OLRB Rep. March 25; *The Walker Bakeries Limited*, [1959] OLRB Rep. May 67; *Lakeshore Bakery Limited*, [1960] OLRB Rep. June 102; *Cunningham's Bakery Limited*, [1960] OLRB Rep. Nov. 287; *Intercity Baking Company Limited*, [1961] OLRB Rep. Sept. 193; *Producers Dairy Limited*, [1976] OLRB Rep. March 435; *Wonder Bakeries Limited*, [1962] OLRB Rep. June 81; *Beaton's Dairy Products Limited*, [1963] OLRB Rep. Apr. 13; *Canada Bread Company Limited*, [1963] OLRB Rep. Aug. 264; *The Walker Bakeries Limited*, [1963] OLRB Rep. Dec. 476; *Dominion Dairies Limited*, [1964] OLRB Rep. July 169; *Ellenzweiz Bakery Limited*, [1966] OLRB Rep. Feb. 789; *Eastwood Food Services Limited*, [1968] OLRB Rep. April 3; *Wittich's Bread Limited*, [1969] OLRB Rep. Jan. 1019; and *Creed's Storage Limited*, [1985] OLRB Rep. Feb. 175. In the instant case, the evidence as a whole establishes that the respondent's driver salesmen and special drivers share a community of interest sufficiently distinct from the respondent's other employees, including the aforementioned eight employees, to make it appropriate to place them in a separate bargaining unit. Unlike the respondent's other (non-clerical) employees who are involved primarily in producing, packaging, or shipping, the work performed by the respondent's driver salesmen and special drivers consists primarily of loading and driving trucks, dealing with customers, and collecting accounts. Driver salesmen and special drivers spend most of their working time away from the bakery. As indicated above, each driver salesman is remunerated on the basis of a percentage of sales made on his route. Special drivers receive an hourly rate, but are eligible (if their work performance is satisfactory) for promotion to a position as a driver salesman when such position becomes available. In addition to the driving skills required by their jobs, driver salesmen and special drivers must be able to deal effectively with customers on an ongoing basis. Driver salesmen and special drivers are directed and controlled by the respondent's Sales Manager, John Tantardini. The respondent's other (non-clerical) employees are directed and controlled by Sonny Silverstein and Murray Appleby (Sonny's brother-in-law, who exercises authority similar to that exercised by Sonny) and, to the extent described above, by Brian,

Jeff, and Mark Silverstein. Although some of the aforementioned eight employees do occasionally drive for the respondent in the limited circumstances described above, they are primarily inside workers who do not share a community of interest with the respondent's driver salesmen and special drivers. Although finding a unit composed of driver salesmen and special drivers to be appropriate for collective bargaining may result in some further fragmentation of the respondent's work force, we are nevertheless satisfied that it represents an appropriate balancing of the various competing interests in the present case, particularly when it is viewed against the backdrop of the Board's longstanding practice in this industry, which the applicant was entitled to rely upon in its organizing activities.

9. A further matter in dispute between the parties is whether four individuals classified by the respondent as supervisors exercise managerial functions within the meaning of section 1(3)(b). In *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, the Board summarized its jurisprudence under that provision as follows:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the two sides whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have divided loyalties. . . .

3. *The Labour Relations Act* does not contain a definition of the term managerial function, nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called first line managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the management team even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between employee and management is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer's organization scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or input should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged

individual. It is this type of recommendation which the Board has characterized as an effective recommendation and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making effective recommendations of this kind are regarded as part of the management team, and are excluded from the bargaining unit.

See also *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199; *Vagden Mills*, [1982] OLRB Rep. June 968; *Hydro Electric Commission of The Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38; and *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396.

10. Having considered all of the evidence and the submissions of the parties in the light of section 1(3)(b) and the principles set forth in the pertinent jurisprudence, we have concluded that of the four persons in question, only Bill Mitchell exercises managerial functions within the meaning of section 1(3)(b). Mr. Mitchell trains many new drivers and makes effective recommendations to Mr. Tantardini concerning whether or not those new drivers will be retained or discharged. He also makes effective recommendations to Mr. Tantardini concerning promotion of special drivers to driver salesmen positions. Although he frequently drives to cover routes in the absence of regular drivers, he also spends 25 to 30 days a year accompanying driver salesmen on their routes to ensure that their route books are in shape and that they are properly servicing their calls. The other three supervisors (Leonard Colbear, Jack Liberman, and Mervin Marietta) are essentially route runners who cover various routes on a relatively regular basis when the drivers who usually service those routes have scheduled days off or have absences from work for other reasons. Although they do some training of new drivers and are occasionally asked by Mr. Tantardini how such new drivers are coming along, the evidence does not establish that they make recommendations affecting the continued employment or other vital job interests of those (or any other) employees that are so frequently forthcoming and consistently followed by Mr. Tantardini that it can legitimately be said that, in fact, the effective decisions concerning such matters are made by them. Thus, the evidence does not justify their exclusion from the bargaining unit on the basis of section 1(3)(b) as they do not make effective recommendations of the kind described above, and do not exercise any of the other traditional manifestations of managerial authority such as hiring, disciplining, discharging, promoting, or demoting employees, or granting them wage increases or time off.

11. For the foregoing reasons, the Board finds that all driver salesmen and special drivers employed by the respondent at and out of its bakery at 195 McCaul Street, Toronto, save and except route supervisor, persons above the rank of route supervisor, and persons regularly employed for not more than twenty-four hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. For purposes of clarity, the Board notes that, for the reasons set forth above, Domenico Annechiario, Nazarali Bhimzi, John Nunes, Pasquale Pontrelli, Feleppo Serraino, Brian Silverstein, Jeff Silverstein, Mark Silverstein, and Bill Mitchell are excluded from the bargaining unit, and Leonard Colbear, Jack Liberman, and Mervin Marietta are included in the bargaining unit.

13. Having regard to the list of employees filed by the respondent and the foregoing disposition of the applicant's challenges to that list, the Board finds that there were 31 employees in the bargaining unit at the time the application was made. In support of this application, the applicant filed with the Board in timely fashion documentary evidence of

membership in the form of cards, which consist of a combination application for membership and receipt. The applicant filed 21 such cards, 20 of which coincide with the names of employees included in the bargaining unit for purposes of the count. There was also filed in this matter a petition expressing opposition to representation by the applicant. The petition bears the signatures of 19 persons, eight of whom also signed membership cards. In the absence of the petition, the applicant would be in a position to obtain certification without a representation vote in respect of the aforementioned bargaining unit. However, the overlap between persons who signed membership cards in the applicant and the persons who signed the petition is such that the Board would generally exercise its discretion to direct that a representation vote be taken if the Board was satisfied of the voluntariness of the petition. The statements of revocation and reaffirmation (counter-petitions) which have been filed with the Board in respect of five of those eight (overlapping) persons would not change that situation for, even if they are assumed to be voluntary, they do not reduce the overlap to the point where a finding that the petition was voluntary would not generally prompt the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote.

14. Accordingly, the Registrar is directed to list this matter for hearing for the purpose of considering the voluntariness of the objectors' petition and all other outstanding matters arising out of and incidental to this application.

1782-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Simpsons Limited**, Respondent, v. Group of Employees, Objectors

Certification – Membership Evidence – Practice and Procedure – Union in certifiable position as of terminal date – 20 percent of unit employees receiving lay-off notices – Whether Board considering union's support at point of lay-off beyond terminal date – Whether exercising discretion to direct vote

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *J. A. Ronson* and *S. O'Flynn*.

DECISION OF THE BOARD; May 27, 1985

1. By decision dated April 15, 1985, a final certificate was to issue to the applicant with respect to bargaining unit #1 (part-time unit) and, with respect to bargaining unit #2 (full-time unit), the Board directed the parties to make written submissions, if desired, on the matters noted reserved in the original Board decision in this application, dated November 7, 1984.

2. That issue concerns the impact of lay-off notices, sent to a number of full-time employees, on the entitlement of those employees to be included in the bargaining unit count and, if any had signed membership cards submitted by the terminal date, to have those cards included in the membership evidence tendered by the applicant. The respondent filed a written submission with the Board; the applicant did not.

3. The respondent acknowledged the decision of the Board in *Simpsons Limited*, [1984] OLRB Rep. Oct. 1520 between the same parties wherein the Board held that employees as of the application date were to be included in the count taken pursuant to section 7(1) of the Act, whether or not some employees had received notices of lay-off effective November 3, 1984. Counsel argued, however, that the impact on the membership count of the exclusion from the bargaining unit of those persons so notified was a relevant consideration with respect to the exercise of the Board's discretion under section 7(2) of the Act. That is, counsel contended that, if the exclusion of those persons would reduce the applicant's level of support to below 55%, this would be an appropriate case for the Board to exercise its discretion to order a representation vote, despite the fact that the applicant was otherwise entitled to certification without a vote. Counsel cited build-up cases by way of analogy, i.e., the interests of existing employees should be balanced against those who would remain in the event the union was certified. Cases cited include: *F. Lepper & Son Limited*, [1977] OLRB Rep. Dec. 846; *General Extrusion Company, Inc.*, 121 NLRB 1165 (1958); *Douglas Motors Corp.*, 128 NLRB 307 (1960); *Plum Creek Lumber Co. Inc.*, 214 NLRB 619 (1974); *Mrs. K's Food Products Ltd. v. United Food & Commercial Workers International Union*, Unreported May, 1984 (Man. C.A.).

4. The Board has developed a number of factors to be considered in determining whether to order a representation vote in what is colloquially referred to as the build-up cases: see *Woodbridge Foam Corporation*, [1985] OLRB Rep. Jan 139; *Marley Roof Tiles Limited*, [1984] OLRB Rep. March 511; *Canadian Cannery Limited*, 57 CLLC 18,056; *F. Lepper & Son Ltd.*, *supra*; *Power Controls*, [1967] OLRB Rep. Mar. 954; *Cameron Packing Inc.*, [1972] OLRB Rep. Nov. 988; *Canron*, [1967] OLRB Rep. Sept. 750; *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829; *Vulcan Equipment*, [1974] OLRB Rep. May 285; *United Asbestos*, [1974] OLRB Rep. Apr. 234; *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637; *B.F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693; *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858; *Spartan Tool & Mould Ltd.*, [1975] OLRB Rep. June 469. The Board is prepared to assume, for the purposes of the respondent's argument, but without so deciding, that similar considerations could be applied in the converse situation, i.e., the shrinking bargaining unit or build-down. In this case, the respondent urges the Board to assess the applicant's level of membership evidence past the layoffs scheduled for November 3, 1984 to ascertain whether the applicant retains a level of support in excess of 55%. If that level is not maintained, the respondent asserts the Board should order a representation vote.

5. However, the build-up cases do not first measure the current level of membership support against the planned increased work force. Rather, in first instance, the existing work force is compared with the scheduled increase in employees. It is only if the current work force does not constitute a substantial and representative core of the planned complement that the Board goes on to assess the membership evidence in the current and projected groups of employees. The conventional measure is 50%. That is, if the present employee complement constitutes less than 50% of the planned work force after the expansion, the Board will proceed to compare the current level of membership with a group representative of the projected work force: see especially, *Woodbridge Foam Corporation*, *supra*; *Marley Roof Tiles Limited*, *supra*. Conversely, if the current size of the work force is at least 50% of the planned complement, and is representative of the categories of employees, the Board will merely assess the membership evidence against the present number of employees in deciding the certification application.

6. In the instant case, the layoffs, although not insignificant in numbers, do not constitute a build-down which would be the converse of the build-up cases. Of the 118 employees at the application date, some 22 or 23 were terminated on November 3, 1984. [The discrepancy arises thusly: 22 persons on Schedule A were indicated as scheduled for lay-off; the respondent's letter of April 25, 1985 stated 23 persons had been laid off.] Whether the figure of 22 or 23 is used, this decrease represents less than 20% of the work force. In the Board's view, this decline is not sufficient to warrant an assessment of the membership support in the work force past the November 3, 1984 lay-offs. The employee complement at that point is reduced but not so as to render the work force at the application date unrepresentative. Thus, even if the Board assumed a build-down was the mirror-image of the build-up, the facts of the instant case would not satisfy the initial criterion applied in those cases.

7. Moreover, the respondent's argument, in essence, is based upon the premise that persons who will not be actively employed once the union is certified and a contract negotiated, who will not be subject to any collective agreement provisions including the obligation to pay union dues (to quote in part from the respondent's written submissions at pg. 4), should not be counted in the usual fashion in the certification application. To reiterate, the respondent asserts that if the deletion of the cards of those who were given layoff notices (and, of course, the others given notice who did not sign cards) results in the slippage of union support to 55% or below, a vote should be ordered. The Board does not agree that receipt of the layoff notices somehow divorces the interests of those employees from the other employees in the bargaining unit. Those scheduled for layoff may have a very real interest in the outcome of the certification application and a subsequent collective agreement. To give but one example, the collective agreement could well provide for recall rights of considerable value to those laid off. Employees at the application date who have received layoff notices may yet retain a real interest in the certification application and bargaining process, if the applicant is certified. Thus, the Board does not agree that such employees' wishes should be discounted, at least, in the present circumstances where the decrease in the work force is less than 20%.

8. The Board would add that, in rejecting the respondent's build-down argument, it is not mechanically applying a build-up rule. Rather, the approach of the Board in build-up cases, as stated earlier, is one of balancing competing interests. In this case, the decrease in the work force resulting from the layoff notices is not such as to make the employee complement at the application date unrepresentative and, in that representative group, the applicant enjoys membership support in excess of fifty-five per cent. Thus, in these circumstances, the Board declines to exercise its discretion, pursuant to section 7(2) of the Act, to order a representation vote where the applicant's level of membership support is greater than fifty-five per cent.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 18, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. Accordingly, the Board certifies the applicant as bargaining agent for all employees of the respondent at its retail stores in Windsor, Ontario, save and except department supervisors, persons above the rank of department supervisor, lead hand in receiving, security

staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a cooperative programme with a school, college or university. (bargaining unit #2). For clarity, J. R. MacKendrick is the lead hand in receiving.

11. The Board notes that the respondent's written submissions requested that the Board rescind its certification and order a representation vote. The Board points out that the certificate issued in the decision of April 15, 1985, was in respect of bargaining unit #1 (the part-time unit), not bargaining unit #2 (the full-time unit). It was only this latter unit which was affected by the lay-off issue on which submissions were invited. Therefore, the Board sees no reason to rescind its certification of the part-time unit (bargaining unit #1). Further, the Board, for the reasons stated above, certifies the applicant as bargaining agent for the full-time unit (bargaining unit #2).

0497-84-R Canadian Paperworkers' Union and its Locals 36, 311, and 1112, Applicant, v. **Somerville Belkin Industries Limited**, Tencorr Packaging Inc., Belkin Packaging Ltd., and Canadian Folding Cartons Limited, Respondents

Practice and Procedure – Related Employer – Sale of a Business – Respondents filing statement of fact and certain documents – Whether sufficient disclosure under ss 1(5) and 63(13) – Whether obligation to produce witnesses – No right to withhold otherwise relevant documents on grounds of confidentiality – Board discussing nature and extent of disclosure required in sale and related employer applications

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *W. H. Wightman* and *P. Grasso*.

APPEARANCES: *Harold F. Caley* and *Garry Buccella* for the applicant; *B. R. Baldwin* and *David Daugharty* for Somerville Belkin Industries Limited; *Howard A. Levitt*, *Rick Ellery* and *John Singer* for Tencorr Packaging Inc.; *Bruce Binning* and *Gerard J. Jansen* for Belkin Packaging Ltd.; no one appearing independently for Canadian Folding Cartons Limited.

DECISION OF THE BOARD; May 24, 1985

I

1. This is an application under sections 63 and 1(4) of the *Labour Relations Act* made by the Canadian Paperworkers' Union (CPU) on its own behalf and on behalf of its Locals 36, 311, and 1112. The named respondents are: Somerville Belkin Industries Limited (Somerville Belkin), Belkin Packaging Ltd. (Belkin), Tencorr Packaging Inc. (Tencorr), and Canadian Folding Cartons Limited (CFC). Somerville Belkin is a wholly-owned subsidiary of Belkin. CFC is a corporate relative of both Belkin and Somerville Belkin, but it appears that this company is inactive, and would not be immediately affected by the outcome of these proceedings. CFC, as such, did not enter an appearance. The relevant provisions of the *Labour Relations Act* are as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associates or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

63(1) In this section,

- (a) business includes a part or parts thereof;
- (b) sells includes leases, transfers and any other manner of disposition, and sold and sale have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

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(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

2. This proceeding was originally scheduled for hearing before the Board on July 9, 1984. At the request of the parties, the matter was adjourned while they pursued settlement discussions. It eventually came on again for a hearing before the Board on October 15, 1984. At the opening of that hearing, the respondents made a number of submissions concerning the interpretation of sections 63(13) and 1(5), as well as the way in which, in their view, the case should be conducted. Before dealing with these submissions it may be useful to briefly sketch in the purpose of the related employer and successor rights sections of the Act. Both are designed to protect bargaining and contractual rights, but their focus is somewhat different.

II

3. Section 63 ensures that when a business or part of a business is transferred to a new owner, the transferee acquires the business subject to the collective bargaining obligations of the transferor. Collective bargaining rights are treated as a kind of vested interest which runs with the business so that the new owner stands in the shoes of his predecessor. Collective bargaining rights are not treated as co-extensive with commercial ownership, nor, in sale of business situations, does the common law notion of privity of contract have any application to collective agreements. Moreover, the term sale is not used in its ordinary commercial sense, but can include a lease arrangement or any other manner of disposition. Of course, it remains to be determined in each case whether there has been a sale of a business within the meaning

of section 63 - that is, whether there has been a disposition or transfer of something, and whether what has been transferred can sensibly be described as a business or part of a business. That is not always an easy task, as the Board noted in *The Tatham Company Limited*, [1980] OLRB Rep. March 366 at paragraph 26:

All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a mere sale of assets and a sale of part of a business. As the Board commented in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1194 at paragraph 34:

This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or 'a part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished [sic] on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a sale of business finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, know-how, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 [now section 63] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

A recent example of this difficulty is illustrated by *Riverview Manor*, [1983] OLRB Rep. Sept. 1564. In that case, the Board held that, in the nursing home industry, the transfer of a nursing home licence may be sufficient, in itself, to warrant a successor rights declaration even though the successor builds a new nursing home in a new location within the same municipality. The licence was the essential asset of the business carrying with it a guaranteed market. Without the licence, the business would not be able to operate. On review, the Divisional Court held that the Board's interpretation was both reasonable and right *in that context* (see *Riverview Manor v. Service Employees' International Union, Local 183*, unreported, February 26, 1985 (Ont. Div. Ct.)). The point is, that from a labour relations perspective, there may be a sale of a business to which section 63 applies, even though a commercial lawyer might not characterize the transaction in this way. That is why it is necessary to carefully analyze all of the facts in order to reach a conclusion which is faithful to both the remedial purpose of the legislation and the commercial context under review.

4. Section 1(4) was enacted in 1971, and deals with situations where the economic activity giving rise to the employment or collective bargaining relationships regulated by the

Act is carried out by or through more than one legal entity. If the requirements of section 1(4) are met, the Board is empowered to pierce the corporate veil and declare them to be one employer for the purposes of the Act. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members will attach to a definable commercial activity rather than the legal vehicle(s) through which the activity is carried on. Legal form is not permitted to dictate or fragment an established collective bargaining structure, nor will alterations in legal form undermine established collective bargaining rights. Indeed, section 1(4) does not even require that the related business activities be carried on simultaneously or contemporaneously. That issue was clarified in 1975 by the addition to section 1(4) of the phrase whether or not simultaneously. The 1975 amendment reflects a legislative recognition that the essential unity of an economic activity or business may be preserved, even though the legal vehicles through which it is carried on may not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any *indicia* of a transfer of a business which might trigger the application of section 63. Section 1(4) is typically applied where a unionized business, intent upon expanding or achieving a commercial advantage, decides to incorporate a new company which it then claims is not bound by the existing collective agreement. In such cases the Board *may* declare the two companies to be one employer for the purposes of the Act.

5. It will be seen that both sections 63 and 1(4) require a careful analysis, from a labour relations perspective, of the details of commercial transactions which ordinarily will not be within the knowledge of the employees or their bargaining agent. That is why, in 1975, the Legislature passed sections 1(5) and 55(13) [now 63(13)] imposing an obligation on respondent employers to adduce at the hearing all facts within their knowledge that are material to the assertion made by the applicant union(s). The purpose and effect of those amendments was considered by the Board in *Canada Cement Lafarge Ltd. and Point Anne Quarry Company*, [1977] OLRB Rep. Jan. 5, in a long passage to which we might usefully refer:

11. Prior to the enactment of sections 1(5) and 55(13), certain threshold evidentiary difficulties faced an applicant attempting to invoke section 1(4) or section 55. For example, the issue under section 1(4), as to whether corporations carrying on related or associated activities or businesses should be treated as one employer, is dependent upon facts which lie peculiarly within the knowledge of the corporations concerned. The same is true where the sale of a business is alleged under section 55. Since the ultimate burden of proof lies with the applicant in such cases, it was necessary, prior to the amendments, for the applicant to subpoena officers or employees of the respondents in an attempt to prove its case. Failure to call any evidence was fatal to the applicant's case: see *Super City Discount Foods Limited*, O.L.R.B. Monthly Reports, August 1969, p.666. Thus, the applicant was in an anomalous position of having to rely upon evidence of persons adverse to the interest which it was asserting. Moreover, in determining how to proceed, the applicant faced several difficult decisions: who amongst a corporation's various officers or representatives was in the best position to testify fully and accurately on all material aspects of the relationship or transaction in question; what documents, if any, should be subpoenaed; how could the subpoena for documents be cast in sufficiently broad terms to cover the appropriate material without it being struck out for lack of particularity? At the hearing, since the respondent's officers were the applicant's own witnesses, the applicant could not probe their testimony in the usual manner by cross-examination. Frequently, therefore, the applicant was left with evidence from a vague, reticent or ill-informed witness – a witness who, at least technically, was his own.

12. It is, we think, reasonable to assume that these and related problems gave rise to the enactment of sections 1(5) and 55(13). As we construe the amendments, the onus of adducing the material facts has now been placed upon the parties having knowledge of, and access to, those facts. What does this mean in practical terms? A basic question, and one raised directly

by Mr. Dunn's motion, is: what is meant by *all* material facts? Construed literally, it could, as Mr. Dunn contends, mean all facts conceivably bearing upon the particular issue in dispute. If that was the Legislature's intention, a respondent's ability to comply would ultimately depend upon the ingenuity and speculative talent of the applicant's counsel. Hypothetically, a series of questions could be devised, the answers to which could conceivably be material. A witness' inability to answer such inquiries could then give rise to repetitive and, in theory, endless assertions that the respondent was failing to fulfil its statutory obligation.

13. In our view, the amendments are not intended to permit an applicant to engage in a fishing expedition of a sort suggested by that hypothesis. Where relief under section 1(4) and/or section 55 is claimed, we believe that the respondent's obligation, must be sensibly delimited. In defining the obligation, some assistance is obtained by looking to Court practice in examinations for discovery in civil actions. Clearly, the analogy is not perfect or complete: the purpose of pre-trial discovery in a civil suit is quite different, as is the rationale for restricting the ambit and nature of questioning on discovery. However, the analogy is instructive, especially where there are corporate parties, for the limited purpose of indicating who should be produced, the extent to which the person produced should prepare himself to testify, and the remedies, should the witness fail to supply information properly requested from him.

14. On an examination for discovery, the person being examined is bound to make reasonable efforts to inform himself of all matters material to the issue in question. In the case of a corporate officer, this entails acquainting himself of facts not within his personal knowledge which are within the knowledge of other officers, servants or agents of the corporation or which form part of the records of the corporation: *Bondar v. Usinovitch*, [1918] 1 W.W.R. 557 (Sask.); *Geddings v. C.N.R.*, (1919) 1 W.W.R. 909 (Sask. C.A.); *Star Electric Fixtures Ltd. v. Sussex Fire Insurance Co.*, [1936] O.W.N. 654 (S.C.); and, generally, *Homestead & Gale, Ontario Judicature Act and Rules of Practice*, vol. 2, p.134.

Similarly, a party giving discovery is under duty to make a careful and diligent search of all relevant documents in his possession and to make diligent inquiries about all material documents which may be in the possession of others for him: *Price v. Price*, (1879), 48 C.J. Ct.215.

Under the Supreme Court Rules of Practice, a corporate witness may be ordered to inform himself concerning questions properly put to him which he is unable to answer. The court also has the power to grant leave to examine a second officer if the witness has failed to give to the party seeking it the information to which it is entitled.

15. We believe that similar principles and procedures should apply under sections 1(5) and 55(13). The obligation to adduce material facts is upon the respondent, and the witness or witnesses chosen by it should tender their evidence-in-chief. Except, in exceptional circumstances (e.g., where the respondent is unrepresented), we do not believe that it is desirable for the Board to conduct the inquiry. Nothing in the recent amendments causes us to disagree with the observation of the Board in the *Super City Discount Foods* case, *supra*, that It is not for the Board. . .to undertake an inquiry of its own in the matter. There may be situations where members of the panel may wish to question witnesses to have testimony clarified or amplified. However, generally speaking, it is desirable that the carriage of the proceedings be left to the parties.

16. Once the respondent has completed its evidence, the applicant may wish to contend that the initial obligation to adduce all material facts has not been met. In such cases, an applicant may, at that stage, ask the Board to direct compliance. In most instances, however, it would seem to us that the applicant should proceed with its cross-examination. If, in cross-examination, the witness is unable, or unwilling, to respond to questioning, and if the applicant can persuade the Board that the answer sought is likely to be material to the issues in dispute, the applicant is entitled to seek a direction from the Board requiring that the information be supplied, either by the witness informing himself or by the respondent producing the information through another witness. If the applicant completes its cross-examination without

objection to the testimony given, it is reasonable to assume that it is content to accept the testimony of the particular witness as tendered. And when the respondent completes its evidence, and the case proceeds without objection from the applicant, the reasonable conclusion is that the applicant has waived any right to contend that the respondent has not fulfilled the obligation created by section 1(5) or section 55(13), as the case may be. It may be noted that there is nothing to prevent an applicant from calling evidence to add to, vary or contradict the testimony of the respondent's witnesses.

Given the positions of the parties on the merits of the present case, it is interesting to note that the Board in *Canada Cement Lafarge Ltd.* eventually determined that because the successor's product, manufacturing process, and market were quite different, there had been no sale of a business, even though the alleged successor carried on operations at the same location as the predecessor.

6. In the instant case, counsel for the respondents Belkin, and Somerville Belkin, each put before the Board a document entitled statement of facts which, it was said, was the final product of a series of earlier drafts. Counsel took the position that this was all that was necessary to satisfy the onus cast upon the respondents by sections 1(5) and 63(13). In counsel's submission, there was no obligation to support these assertions of fact, demonstrate that they are material, amplify or clarify them, or produce a witness who could be submitted to cross-examination or questioning about the facts asserted or any other facts arguably material to the Board's determination.

7. It was also asserted that what has been put forward in the purported statements of fact may or may not be entirely true or complete; however, the respondents argue that they should have to address that matter only *after* the union has called its evidence on the transaction and relationships between the various respondents. The respondents point out that section 1(5) refers only to facts respecting common control and direction – not whether the respondents are engaged in related activities or businesses. The respondents argue that there is no obligation whatsoever to tender any facts or information about the nature of the respondents' business activities – although their document did, in fact, contain some information in this regard.

8. The respondents also filed with the Board copies of certain purported leases, debentures, and related documents indicating at least some of the commercial relationships between them. The respondents resisted the production of any other documents and, in particular, the so-called corrugator financing agreement between Belkin and Tencorr. This agreement is one of several related documents evidencing an important transaction and commercial relationship between Belkin and Tencorr which is mentioned in the statements of fact and some of the documents filed with the Board, but is otherwise unexplained. The respondents assert that these documents (and perhaps others) are not material to these proceedings and contain sensitive and confidential financial information which they are unwilling to disclose. Finally, the respondents submit that the Board should only consider section 1(4) of the Act and the relationship, if any, between Somerville Belkin and Belkin. They argue that the union's concern is restricted to the business activities currently being carried on at the former Somerville Belkin premises at 188 Cartwright Avenue in Toronto, and assert that the only collective agreement potentially applicable to that location was an agreement between Somerville Belkin and CPU, Local 311.

9. Assuming, for the moment, that the factual assertions filed with the Board are true,

and the commercial documents are genuine (albeit incomplete), what is the picture that emerges?

10. Somerville Belkin is a wholly-owned subsidiary of Belkin and, for a time, produced folding box board cartons at its manufacturing facility at 188 Cartwright Avenue in Toronto. Its employees were represented by CPU, Local 311. In 1981-82, that operation was transferred to another Toronto plant on Rayside Avenue which was purchased by Belkin and subsequently transferred to Somerville Belkin. The employees of the Rayside plant were, and remain, represented by CPU, Local 36. However, Somerville Belkin continued to use the Cartwright Avenue premises as a warehouse until March, 1984, and, while doing so, applied the Local 36 collective agreement to the employees stationed there. Belkin also has a collective agreement with CPU, Local 1112, covering employees of what is described as a paperboard mill.

11. At the present time, Tencorr occupies one-half of the Cartwright Avenue premises and Belkin occupies the other half. Tencorr obtained a sublease of these premises from Somerville Belkin, which was directed by its corporate parent to execute that document. Belkin has a sublease for the other half of the premises. In addition, Belkin entered into a multi-faceted commercial relationship with Tencorr involving what is described as: a corrugator financing agreement with Tencorr which encompassed a loan transaction secured by a debenture, a container board sales agreement, a sublease of part of the premises at 188 Cartwright Avenue, a purchase order for equipment being financed under the corrugator financing agreement and a shareholders' purchase agreement. The union's position is that, superficially at least, the essential elements of Tencorr's business (premises, equipment and maybe even market) were secured from Belkin or Somerville Belkin which, admittedly, are related companies. The picture is not clear. A number of these documents were not filed with the Board and, of course, the sublease is actually from Somerville Belkin. It might also be noted that the lease with *Somerville Belkin* mentions the corrugator financing agreement, obligates Tencorr to maintain, *inter alia*, the equipment financed under that agreement, requires the maintenance of insurance satisfactory to *Belkin* (interestingly enough described as the sublessor rather than Somerville Belkin) which must be named as an insured, restricts the use of the premises to a corrugated container plant or such business or operations as may be ancillary thereto or capable of being conveniently carried on in connection therewith without consent of *Somerville Belkin*, and provides that any notices required under the agreement be given to both *Somerville Belkin* in Mississauga and *Belkin* in Vancouver. It is clear that while the sublease is nominally between Somerville Belkin and Tencorr, a key player in the transaction is Belkin, the corporate parent which at one point in the document is even described as the sublessor.

12. At the present time, the details of these relationships are uncertain, because the supporting documentation has not been revealed. Nor is it entirely clear whether Tencorr acquired any equipment from Somerville Belkin, whether it is sharing any equipment installed by Belkin on its half of the premises, whether or to what extent the operations of Belkin and Tencorr are physically, functionally or economically interrelated, and whether the commercial arrangement with Belkin gives it effective direction or control over Tencorr's business activities. Certainly they do share the same premises formerly occupied by Somerville Belkin, Belkin's subsidiary, and apparently both will produce (in a generic sense) a kind of paper packaging product. Of course, whether one or more of these entities might be related in the sense contemplated by section 1(4), and even if they were, whether the Board would so declare, would depend upon an assessment of all of the facts. Likewise, as we have already

noted, the potential application of section 63 depends upon a careful assessment of all of the economic and business circumstances in light of collective bargaining considerations, and the underlying purpose of both sections 63 and 1(4) which are both intended to preserve rather than extend bargaining rights. At this stage, we do not think it would be appropriate to narrow the scope of the Board's enquiry or focus on but one set of relationships or parties to the exclusion of the others. Such approach might be warranted if there were full and complete disclosure of the details of these relationships, but is not appropriate where, as here, the respondents are not prepared to fully disclose the legal and economic relations between them.

13. We have considered the respondents' submission that a mere recitation of facts asserted by them to be material (but, they concede, not necessarily true, complete or provable) is sufficient to fulfill the onus under sections 63(13) and 1(5). We do not accept that position. It appears to the Board that the procedure enunciated in *Canada Cement Lafarge Ltd.*, *supra*, is the correct one, and the appropriate course to follow in the instant case.

14. While there may well be a distinction between facts and evidence, we do not think it is a helpful one in interpreting the onus provisions of sections 63(13) and 1(5) of the *Labour Relations Act*. Nor is the discovery analogy entirely parallel, appropriate, or applicable to proceedings before this Board. Of more assistance is the remedial thrust and purpose of the 1975 amendments, which, in our view, clearly require the respondents to produce witnesses to testify under oath as to the material facts of the transaction and relationships under examination, as well as the completeness and materiality of those facts. To say that this obligation can be satisfied by pleadings – which need not be substantiated – is to blunt the intent of the legislative change. Moreover, while it may be that section 1(5) is restricted to the question of common control or direction, section 63(13) clearly has no such limitations. Section 63(13) requires the respondent employers to adduce *all* of the facts of the transaction(s) between them said by the applicant union to constitute a transfer of all or part of a business. As noted above, that determination turns on a careful analysis of all of those facts, having regard to the purpose and ambit of section 63, and in the absence of a more complete disclosure of the commercial facts, we are hesitant to limit the obvious effect of section 63.

15. It may be that the union will not be successful in its various assertions. But that does not diminish the respondents' obligation to provide the required information. Questions of relevance or concerns about confidentiality can be dealt with as they arise. Proceedings of this kind always involve the details of the parties' corporate commercial relationships, but, *prima facie*, there is no right to withhold the production of otherwise relevant material on the ground that it may contain confidential financial information. The Board can entertain such evidence, in camera, should that be necessary and, of course, any *improper* use of confidential information gained through this proceeding would be a contempt of the Board and subject to appropriate sanctions (see *Shaw-Almex Ind. Ltd.*, [1984] OLRB Rep. Apr. 659). We do not think we should assume in advance that there would be an abuse of the Board's process.

16. For the foregoing reasons the Registrar is directed to relist this matter for hearing, at which time the respondents will be required to produce witnesses to adduce all facts within their knowledge that are material to the successor rights and related employer allegations. Such witnesses will be subject to cross-examination in the manner discussed in *Canada Cement Lafarge Ltd.*, *supra*.

17. We do not wish to leave this matter without making some brief concluding observations.

18. This is but one of dozens and dozens of successor rights or related employer proceedings which have come before the Board in recent years. The members of this panel of the Board have been involved in quite a number of these cases. In our experience, and when all is said and done, the commercial facts have not generally been much in dispute – even though the process of adducing those facts through *viva voce* and documentary evidence has sometimes been laborious and time-consuming. In most cases, the real problem is not the commercial facts, but whether the circumstances trigger section 63, or, in the Board's opinion, should trigger section 1(4). These questions of labour relations law and policy are often much more difficult to resolve than the details of the underlying commercial transaction, which usually come out sooner or later, either in accordance with sections 1(5) and 63(13), from witnesses or documents subpoenaed by the union, or as a result of inferences properly drawn from the evidence adduced before the Board or conspicuously absent. For this reason, it is not at all unusual for parties in proceedings such as these to meet, in advance, to narrow the issues or even agree on the commercial and collective bargaining facts upon which the Board must ultimately make its determination. Indeed, such pre-trial discovery can often result in a resolution of the entire matter. While the facts vary in infinite degree, the general principles that the Board applies to those facts are relatively straightforward: the purpose of the remedial provisions is to preserve, not extend the scope of the union's bargaining rights; a dependent or even symbiotic economic relationship will not necessarily trigger section 1(4) or 63, and the transfer of certain assets of a business does not necessarily constitute the sale of part of a business within the meaning of section 63. The Board recognizes that companies may be able to engage in joint ventures without extending bargaining rights to their unorganized partners and that, to some extent, a business can be identified and defined only in respect of a particular product and market. That is the thrust of the *Riverview Manor* decision referred to above.

19. With these observations in mind, we respectfully suggest that the parties meet with a view to resolving the commercial facts of the transactions under consideration in this case and determining what facts, if any, are in dispute. Such frank disclosure may well make a continuation of this proceeding unnecessary. In any event, the Registrar is directed to relist the matter for hearing. This panel of the Board is not seized with the merits of the case.

0132-83-M United Brotherhood of Carpenters and Joiners of America, Local Union 27, Applicant, v. Janin Building and Civil Works Ltd., **Sword Contracting Limited**, Respondents, v. Labourers International Union of North America, Local 183, Intervener #1, v. The Form Work Council of Ontario, Intervener #2, v. The Ontario Form Work Association, Intervener #3, v. New Rise Forming, Intervener #4, v. Metropolitan Toronto Apartment Builders Association, Intervener #5

Construction Industry – Practice and Procedure – Non-profit organization constructing building to house nursing home and retirement home – Whether work within ICI or residential sectors – No generally accepted area practice – Fact that people reside not determinative – Board considering nature of operations – Finding work ICI

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

APPEARANCES: *Douglas J. Wray* and *John Cartwright* for United Brotherhood of Carpenters and Joiners of America, Local Union 27; *James B. Noonan*, *Richard Nixon* and *Christian Huc* for Janin Building and Civil Works Ltd.; *R. C. Filion, Q.C.* and *A. Gagne* for Sword Contracting Ltd.; *R. C. Filion, Q.C.* and *K. Mallette* for Metropolitan Toronto Apartment Builders Association; *S. B. D. Wahl*, *L. Detoni* and *R. Lotito* for Labourers International Union of North America, Local 183 and The Form Work Council of Ontario; *Jeffrey Davis* and *Tony Michael* for the Ontario Form Work Association and New Rise Forming.

DECISION OF THE BOARD; May 28, 1985

1. This matter commenced as a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. One of the issues raised by the grievance was whether or not certain work comes within the industrial, commercial and institutional sector (the ICI sector) of the construction industry. The Board entertained the evidence and the representations of the parties with respect to this issue pursuant to the provisions of section 150 of the Act, which provide as follows:

The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117 (e).

2. The work in question is connected with the construction of the Harold and Grace Baker Centre (the Baker Centre) in the City of York in the Municipality of Metropolitan Toronto. The Baker Centre is to be used primarily as a 120 bed nursing home and a 120 bed retirement home, although a certain amount of space has also been allocated for a day-care centre for 25 children and a smaller day-care facility for seniors. The United Brotherhood of Carpenters and Joiners of America, Local Union 27 (the Carpenters Union) contends that work on the project comes within the ICI sector of the construction industry. The other parties, however, contend that the work comes within the residential sector. This is the first time that the status of work on a nursing home or retirement home has been litigated before the Board. Given the complexity of the issues involved, a great deal of evidence was led by the parties. Indeed, a total of 49 individuals were called to testify. We have attempted in this decision to

briefly summarize that part of their evidence we consider most relevant to the issue before us.

3. The Baker Centre is named after Dr. Harold Baker, a former staff member of the Northwestern General Hospital in the City of York, and his wife Grace. The impetus for the construction of the Centre came from the Northwestern General Hospital. In 1981 the Hospital made arrangements with the Ontario Ministry of Health for the issuance of a nursing home licence. Subsequently, it was decided that the project would be expanded to also include a retirement home and day care facilities. The Baker Centre is located next to the Hospital. The land on which the Baker Centre is located is owned by the Centre. Most of this land was purchased by the Baker Centre from private owners. Some of the land, however, was transferred to the Centre by the Hospital at no charge. Another part of the land was previously owned by the City of York. This land was given to the Baker Centre by the City in return for the City receiving certain other lands from the Hospital.

4. A brochure put out by the Baker Centre refers to the history and purpose of the nursing and retirement home portions of the Centre as follows:

For the first time in Metro Toronto, a non-profit nursing/retirement home will be associated with an active treatment general hospital.

In early 1981 Northwestern General Hospital was awarded a license by the Ministry of Health to build a 120 bed nursing home on its property, and since that time the concept has expanded to include a 120 bed retirement residence, a day care program for seniors and a day nursery for children.

The \$11 million Baker Centre currently under construction on a 4-acre site adjacent to the hospital is scheduled to begin operation next spring.

Mr. Patterson, Chairman of the Baker Centre's Board, has been involved with the Baker Centre since planning began three years ago. He says the facility will introduce a continuous care concept that will allow the elderly person to remain in the same familiar environment as his accommodation and health care needs change.

For instance, a fairly healthy senior may live in the retirement residence or attend the senior's day care program. Should there be a health change, transfer to the nursing home section or into the hospital could be accomplished without the major upheaval normally associated with such a change. The individual would not be uprooted from friends, familiar doctors or the community, Mr. Patterson explains.

The Baker Centre, managed by its own Board of Directors, is a registered non-profit corporation and an integral part of the Northwestern Health Centre. The Board includes Hospital, community, Auxiliary and City of York representatives.

5. As indicated in the above excerpt, the Baker Centre is part of the Northwestern Health Centre. In a 1983 edition of *Horizons*, a publication of the Northwestern Health Centre, the purpose of the Health Centre was described as follows:

Northwestern Health Centre, a new umbrella name to reflect the Hospital's expansion into other areas of health care, has been adopted by Northwestern's Board of Directors.

Morris Emer, Chairman of the Hospital's Board of Directors, says that the new name was adopted to better describe the overall complex which will include facilities now planned or under construction.

Northwestern's evolving into more than just a hospital, he explains. A nursing home and retirement residence are under construction and we are planning a senior's day care program and children's day nursery as well. In addition, a foundation has been established to generate funds in support of all components of the Health Centre.

Northwestern's Executive Director, Ron Woods, says that the new name nicely sums up what the Hospital and new facilities are coming to mean to the community they serve: A health centre does a lot more than provide treatment for severely ill patients. It's an important health and residential focus for the whole community.

6. Although part of the Northwestern Health Centre, the Baker Centre has a separate legal existence from the Northwestern General Hospital. It is a corporation without share capital that is registered with Revenue Canada as a charitable organization. The Baker Centre has a 13-member board of directors. The bylaws of the Baker Centre stipulate that six of these directors, including the chairman of the Centre, must be approved by the Board of Directors of the Northwestern General Hospital. Another director, who must be a member of the medical staff of the Hospital, is to be approved by the medical advisory committee of the Hospital. The executive director of the Hospital is an ex-officio director of the Baker Centre. Another director of the Centre is to be approved by the Auxiliary of the Centre and/or the Auxiliary of the Hospital. Of the four remaining directors, one is to be approved by the City of York, and three are to represent the interests of the community.

7. Close to 100 per cent of the cost of building the Baker Centre was raised by way of a mortgage. The mortgage is covered by loan insurance arranged through the Canadian Mortgage and Housing Corporation (CMHC). The CMHC also agreed to provide funds which would have the effect of lowering the mortgage interest with respect to most of the project by 2 per cent. This 2 per cent interest reduction covers what is referred to by the CMHC as the shelter component of the Baker Centre, but excludes the non-shelter component. The CMHC considers as part of the shelter component the bedrooms in both the nursing home and retirement home portions of the project, communal dining facilities, lounge areas as well as a beauty and barber shop. The part of the project considered as non-shelter component includes corridors, nursing stations, day-care facilities, a doctor's office and an infirmary. This non-shelter component accounts for 5.8 per cent of the Centre's total floor area. Ms. Shirley Brodeur, the Manager of Social Housing for the CMHC's Toronto office, testified that the Baker Centre received financial assistance from the CMHC under a non-profit housing plan because it will be providing shelter to senior citizens. Ms. Brodeur indicated that similar financial assistance had been given by CMHC to other non-profit nursing homes, senior citizens apartments and organizations that care for and house handicapped and disabled persons.

8. The plans for the Baker Centre call for the construction of a building shaped somewhat like a horseshoe. The centre of the horseshoe is a six-storey block. Running out from both sides of this centre block are arms one-storey high. The ground floor of the centre block contains a lounge, greenhouse, offices, a tuck shop, washrooms, a kitchen, a dining room and a craft room. With the exception of a mezzanine floor, which contains a lounge, a library and certain other facilities, the other floors in the central block contain bedrooms, each with an attached washroom, to be used as the retirement home portion of the building.

The bedrooms are for one or two people. The Baker Centre refers to the rooms as being either private or semi-private. The washrooms do not contain tubs, although each floor has a tub room. Individual units do not contain any cooking facilities, it being anticipated that residents will either eat in a common dining room or have tray service to their rooms. There is, however, a servery on each floor where residents can make themselves hot drinks and snacks.

9. A basement located under the centre block of the Centre also extends under part of one of the arms. The basement contains a storage room, electrical and mechanical rooms, staff locker rooms, an office, day-care areas, a snack bar, servery, craft room, beauty and barber shop, volunteer room, sewing and mending area, as well as a shipping and receiving area. It is anticipated that areas such as the snack bar and servery will be utilized primarily by residents in the retirement portion of the building, although they will also be available for use by residents of the nursing home portion.

10. There are no nursing stations in the retirement home portion of the Centre. However, an emergency call system in each bedroom has been roughed in. Mr. Douglas Anderson, the Vice-Chairman of the Baker Centre, testified that it is hoped that a service club will provide the money to pay for the installation of the call system. The literature put out by the Baker Centre to attract residents indicates that medical and nursing care will be available to retirement home residents if required. This point was reinforced by Mr. Anderson, who indicated that nursing staff from the nursing home portion of the Centre will be available to retirement home residents in need of assistance.

11. The two arms running out from the centre block contain the nursing home portion of the complex. They contain a number of single and double bedrooms as well as some four-bed wards. There is also an office for a nursing director, nursing stations, tub rooms, a dispensary, lounges, and a dining room. Mr. Rick O'Donnell, the Executive Vice-President of Bestview Health Care Ltd., which has been awarded a contract to manage all of the Baker Centre, except for the day care facilities, testified that it is anticipated that one of the nursing home wings will house residents requiring light personal care, that is, about 1.4 hours of care per resident per day, while the other wing will be for residents requiring heavier care of about 1.8 or 1.9 hours per day. It is anticipated that most of this care will take the form of health care aides assisting residents with the activities of daily living, and that each resident will receive about 0.15 hours per day of care from a registered nurse.

12. Mr. O'Donnell testified that the retirement/nursing home portions of the Baker Centre will be staffed by a director of nursing, two nurses on duty at all times, as well as a number of health care aides. He anticipated that the Centre will also require the services of three cooks, between 15 and 20 kitchen helpers, eight housekeeping staff, two employees in the laundry, a maintenance person, an activities director in charge of activities and social programs, as well as a general office staff. According to Mr. O'Donnell, it has not yet been decided whether the beauty and barber shop will be staffed by employees of Bestview Health Care Ltd. or whether the operation of the facility will be contracted out.

13. The construction of the Baker Centre was let by tender to a general contractor. For certain general contractors the tendering process raised the issue of whether the project comes within the ICI sector of the construction industry, in that they are obliged to honour the terms of a number of provincial agreements applicable to the ICI sector. A considerable amount of evidence was led concerning what sector participants in the construction industry generally

view nursing homes, retirement homes, and senior citizen apartments as coming within. The evidence establishes that it is widely accepted among construction firms operating in the Toronto area that senior citizen apartments comprised primarily of self-contained apartment units come within the residential sector. It is of interest that in a relatively small number of senior citizen apartment buildings, which were apparently constructed on the understanding that they came within the residential sector, contain a common kitchen and dining room, although no personal care is provided to the residents. In dealing with the extent of the availability of common services in senior citizen apartment buildings, we would note that we have largely discounted the evidence of Mr. Kunst, the President of West York Construction Company. Mr. Kunst indicated that his firm had been involved in constructing a number of senior citizen apartment buildings containing common kitchens and dining rooms. Mr. Kunst's evidence with respect to certain of these buildings, however, was directly contradicted by other witnesses, including Mr. William Pinder, the manager of field operations for the Metropolitan Toronto Housing Company, the organization responsible for the construction of many of the facilities in question.

14. Although participants in the construction industry in the Toronto area generally regard the construction of senior citizen apartment buildings as coming within the residential sector of the construction industry, the matter is not so clear with respect to the construction of nursing homes and retirement homes. It is noteworthy in this regard that frequently the issue of what sector these projects come within does not even arise. This is particularly true where the construction is being undertaken by general contractors (or owner-clients acting as their own general contractors) who are not bound to any construction collective agreements. When letting subcontracts, these builders generally need not, and do not, pay attention to the issue of whether the subcontractors they utilize have a union affiliation, and if so whether they will be performing the work under a residential or ICI collective agreement. A number of witnesses connected with non-union general contractors and owners who act as their own general contractors testified that when these firms build nursing and retirement homes, the work generally ends up being performed primarily on a non-union basis, although not infrequently some of the work is awarded to unionized subcontractors.

15. As already indicated, for some unionized general contractors, particularly those bound to ICI provincial agreements, it is relevant as to whether a project is regarded as coming within the residential or ICI sector. Evidence was led with respect to a number of nursing/retirement homes that were built by general contractors on the understanding that they were ICI projects. However, the evidence indicates that other general contractors built such facilities on the basis that they came within the residential sector. One large general contractor, Harbridge and Cross Ltd., appears to have built such facilities on an ICI basis in some instances, and on a residential basis in others. In 1979 Harbridge and Cross was engaged in constructing a building designed to eventually become a nursing home as if it came within the residential sector. The Carpenters Union applied to the Board for a declaration that the project came within the ICI sector. The General Contractors Section of the Toronto Construction Association, of which Harbridge and Cross was a member, settled the matter with the Carpenters union. One of the terms of settlement was that the General Contractors Section would advise its Toronto area members bound to the Carpenters provincial agreement that they should regard nursing home construction as coming within the ICI sector. A notice containing such advice was issued by the General Contractors Section on November 13, 1979.

16. In addition to evidence relating to how general contractors regard the construction

of nursing and retirement homes, considerable evidence was led concerning the involvement of companies belonging to the Ontario Form Work Association in the construction of these types of facilities. The companies involved are bound to a collective agreement between the Ontario Form Work Association and The Form Work Council of Ontario, being a council of trade unions comprised of Labourers International Union of North America, Local 183 (Labourers Local 183) and the International Union of Operating Engineers. Apart from crane operators, all employees working under this agreement generally belong to Labourers Local 183. Members of Labourers Local 183 working under the form work agreement perform certain work which is generally regarded as carpenters work when the Carpenters ICI provincial agreement is applicable. The evidence indicates that most of the work performed under the form work agreement in the Toronto area is residential apartment construction. However, there is nothing in the form work agreement that limits its application only to residential projects, and the bargaining relationship giving rise to the agreement has been exempted from the designations made pursuant to the provincial bargaining sections of the Act. Accordingly, it appears that forming contractors bound by the form work agreement are free to apply the agreement in the ICI sector. In some cases general contractors have utilized companies bound to the form work agreement to work on nursing homes and retirement homes because they regarded the work as coming within the residential sector. However, it appears that certain non-union general contractors and owner-clients acting as their own generals who do not have to be concerned about what sector the work comes within, have utilized firms bound to the form work agreement only on the basis of considerations such as cost. Accordingly, the mere fact that a company bound to the form work agreement has worked on a nursing home or retirement home project does not necessarily mean that the work was regarded as having been within the residential sector. This fact was driven home by the evidence of a number of owners of companies bound to the form work agreement who testified that in the Toronto area they have applied the agreement not only to the construction of nursing and retirement homes, but also to the construction of office buildings, hotels and churches. One owner testified that outside the Toronto area his company had applied the agreement to the construction of a hospital.

17. In June of 1983 the Metropolitan Toronto Apartment Builders Association (the MTABA) and Labourers Local 183 entered into a collective agreement that deems an apartment building for the purposes of the agreement to include:

structures used for sleeping accommodation and/or occupancies in which persons, because of age, mental or physical limitations require special care or treatment and all facilities connected therewith.

The MTABA and Labourers Local 183 are active in residential apartment construction, and it may be to the advantage of one or both of them to take an expansive view of what constitutes an apartment building. It is noteworthy, however, that others active in the construction industry have not accepted this definition. This is in contrast to the narrower definition of an apartment building contained in agreements between the MTABA and the Toronto-Central Ontario Building and Construction Trades Council, a definition which the Board in the *West York Construction Ltd.* case, [1983] OLRB Rep. Dec. 2132 found to be generally accepted in the construction industry in Toronto.

18. A number of general contractors submitted bids for the Baker Centre project. Among these general contractors were Milne and Nichols Limited, Varamae Construction Ltd., V. K.

Mason Construction Ltd. and Pigott Construction Ltd., all of whom prepared their bids on the understanding that the job was an ICI project. However, at least three other general contractors, namely Sword Contracting Limited, West York Construction Ltd. and Bradsil Limited, prepared their bids on the basis that the project came within the residential sector. Sword Contracting, which is a member of the MTABA, was awarded the contract. In that Sword Contracting viewed the project as residential, it did not regard itself as bound by any obligation to limit itself to sub-contractors bound to ICI provincial agreements. We would pause at this point to note that it has not in fact been established that Sword Contracting is bound to any provincial ICI agreement. The Carpenters union contends that the respondent Janin Building & Civil Works Ltd. and Sword Contracting are carrying on related activities and that, pursuant to the provisions of section 1(4) of the Act, the Board should declare the two to be a single employer. The Carpenters union further contends that Janin Building & Civil Works Ltd. is bound to the Carpenters ICI provincial agreement and that the effect of a declaration of the type requested would be to also bind Sword Contracting to the agreement. To date the Board has not heard any evidence with respect to these submissions.

19. Although Sword Contracting did not regard itself as bound to any ICI provincial agreement in the construction of the Baker Centre, this did not foreclose it from awarding subcontracts to firms employing tradesmen under the terms of various ICI provincial agreements. Several of the subcontractors utilized by Sword Contracting did, in fact, apply provincial ICI agreements on the job. The concrete forming work on the Baker Centre was awarded to New Rise Forming Co., a company bound to the collective agreement between the Ontario Form Work Association and The Form Work Council of Ontario. As already noted, although this agreement is generally associated with residential construction, it is not limited to that sector. Indeed Mr. Dominic Cipriani, the owner of New Rise Forming, testified that another company owned by himself had applied the same collective agreement on the construction of two office buildings. Partway through the construction of the Baker Centre, New Rise Forming ran into financial difficulties. Sword Contracting then directly hired the former employees of New Rise Forming to complete the work and applied the terms of an agreement between it and The Form Work Council of Ontario which picked up the terms of the collective agreement between the Council and the Ontario Form Work Association.

20. As noted above, most of the Baker Centre is to be utilized as both a nursing home and a retirement home. This is somewhat unusual, since most retirement homes and nursing homes are not built under the same roof. The Baker Centre is somewhat unique in another way. Although most nursing homes and retirement homes in Ontario are built and operated as profit-making ventures, the Baker Centre will be built and operated by a non-profit organization.

21. One of the witnesses who testified before the Board was Mrs. Pamela Cluff, an architect with extensive experience in designing facilities for the aged. Mrs. Cluff authored a book published in 1979 by the CMHC entitled *Nursing Homes and Hostels with Care Services for the Elderly, Design Guidelines*. In her book Mrs. Cluff described the function of a nursing home as follows:

Nursing Homes

Nursing homes can be defined in terms of function, length of stay, condition of the resident, care given, staff requirements and facilities provided. The nursing home's primary function is

seen to be the provision of accommodation on an extended basis. Accommodation of this kind is made necessary by the nursing home resident's need for personal care. This care may include help with dressing, grooming, bathing, eating and services such as help in walking, getting in and out of bed. It also commonly includes medical help in the form of special diets, medication and dressings, and restorative and recreational services. When these forms of aid are beyond the ability of the resident and his family and friends to provide, accommodation with services is required.

The average stay in a nursing home is four years, with a growing tendency to even longer periods. By contrast, the average length of stay in a hospital is seven to nine days. This difference is crucial and underscores the importance of a residential environment in long-term care facilities.

22. In Ontario, nursing homes can only operate pursuant to a licence issued by the Ministry of Health. The *Nursing Homes Act* and regulations thereunder govern many of the details relating to the operation of a nursing home, and government inspectors are authorized to inspect any nursing home as well as its operating records to ensure that the Act and regulations are being complied with. The regulations set out admission requirements for nursing home residents, and require that at least three-quarters of the beds be available for extended care residents. These are residents who require at least ten and a half hours of nursing and personal care per week. All extended care residents must be eligible for extended care coverage under the Ontario Health Insurance Plan. Any other residents, who can constitute no more than 25 per cent of all residents, must require between seven and ten and a half hours of nursing and personal care per week. Mr. O'Donnell of Bestview Health Care Limited, who is also a past-president of the Ontario Nursing Home Association, testified that generally about one-third of the residents in a nursing home can move about without any assistance, one-third can move about with the assistance of a cane or other walking device, and one-third need the assistance of a wheel chair or the nursing home's staff. Generally nursing home residents leave the home either on account of death or transfer to a hospital.

23. The regulations under the *Nursing Home Act* dictate the minimum size of residents' bedrooms, the minimum size of residents' beds, the placement of beds within bedrooms and the location of bedroom windows. The regulations require a nursing station as well as a sitting room on each floor. Also required is an area for a crafts and activities program, where the equipment must be in a good state of repair and an adequate supply. The regulations also deal in some detail with the staffing of nursing homes. They require that nursing service be provided 24 hours per day, divided into three shifts. Monthly in-service training programs for nurses are mandatory. The regulations also mandate the type of facilities that must be made available to employees of a nursing home.

24. There are a range of retirement facilities other than nursing homes. One type, such as the retirement home portion of the Baker Centre, is similar in certain respects to a nursing home in that some care services are available and a resident has exclusive use only of a bedroom, and even then it may be a semi-private room shared with another person. Mrs. Cluff in her book referred to facilities such as these as hostels and commented on them as follows:

Hostels

A hostel may also be described as independent-living group accommodation for the elderly, in which there is sharing of one or more facilities such as dining room, kitchen, bathroom or living room, with or without minimal care services. Hostels do not necessarily offer more

intensive levels of care although usually more on-site services and facilities are available. This form of support for the elderly in which the bedroom area is supplemented and balanced by planned living areas, where the normal activities of daily living can be enjoyed, represents a fairly new architectural and sociological approach.

25. The evidence suggests that most retirement homes in Ontario provide staff to assist residents who require aid with their personal care. Generally the care is considerably less than that given in a nursing home. Some retirement homes, however, do give a level of care approximating that found in nursing homes, although unlike nursing homes, retirement homes receive no government funds and are not subject to the *Nursing Homes Act*. One witness, Mr. John Fydina, testified that he operates both a retirement home and a nursing home in Richmond Hill, and that there are some residents in the retirement home who receive the same services that they would receive in the nursing home. It is perhaps noteworthy that Mr. Fydina originally built the retirement home to be a nursing home, but was unable to obtain a nursing home licence for it. Mr. Fred Lafontaine, the president of Community Nursing Homes Limited, which operates eleven nursing homes and three retirement homes, when asked what was the difference between the two, remarked not a heck of a lot. Mr. Lafontaine did note, however, that although retirement home residents frequently need assistance with the functions of daily living, they generally require less assistance than nursing home residents. Even in retirement homes where relatively limited care is given, it is not unusual to find registered nurses on staff, although in such instances the registered nurses may be available primarily as a precaution in case a resident begins to have medical problems.

26. Nursing homes and retirement homes are easily distinguished from hospitals. Unlike the lengthy stay of most residents in a nursing or retirement home, people generally stay in a hospital for a relatively brief period of time. Further, unlike the situation in nursing and retirement homes, hospital care is generally geared to treatment of the individual. There are, however, some exceptions to these generalizations. This is particularly true with respect to chronic care patients whose potential for rehabilitation is limited and who may be hospitalized for extensive periods of time.

27. As already noted, one of the witnesses was Mrs. Pamela Cluff, the architect and author of the CMHC book. Mrs. Cluff has also served as a consultant on various aspects of care and housing for the elderly. When being examined in chief by counsel for Sword Contracting and the MTABA, Mrs. Cluff was asked where, in her opinion, the line should be drawn between residential and institutional facilities. Mrs. Cluff indicated that she would draw the line between hospitals, which are institutions, and nursing and retirement homes which she viewed as residential. Later, when being cross-examined, Mrs. Cluff agreed that she associated the term institution with the medical model of care for the elderly, which is a paternalistic and regimented model involving having others tell seniors how they should live. Mrs. Cluff added that people involved in the planning of care for the elderly do not view the opposite to the institutional or medical model as a residential model, but rather a social model. The social model centres around encouraging individuals to be autonomous, and as independent as possible. Mrs. Cluff agreed that when dealing with the elderly the term institution has a negative connotation, one which involves an image of care facilities which she and others are trying to change. Mrs. Cluff indicated that in her view whether or not a facility is an institution relates largely to the style of its operation. When asked how she would determine if the Baker Centre was institutional, Mrs. Cluff replied that she would like to know both the philosophy of management and philosophy of care in the facility, and perhaps observe the way it actually

operates. Mrs. Cluff added the comment that an inspired administrator can de-institutionalize what you would regard as an institution. Mrs. Cluff indicated that although the medical or institutional model of care for the elderly predominates in some provinces, such as Alberta, in Ontario the competition between the two models is an ongoing one in which the social model is gaining greater acceptance.

28. Mr. Gary Chatfield, the President of the Health Care Division of Extendicare, and previously an Assistant Deputy Minister with the Ontario Ministry of Health, and the Deputy Minister of Hospitals and Medical Care in Alberta, testified that in his view the line between residential and institutional facilities would best be drawn between nursing homes and hospitals. According to Mr. Chatfield he would draw the line at this point because in nursing homes the prime concern is the comfort of residents, which is not the case in hospitals. Mr. Chatfield added that nursing homes are geared more to people to people as opposed to people to machines as is found in hospitals. A similar view was expressed by Mr. Victor Heinrichs, a professional architect who has designed at least 150 facilities for the elderly. Mr. Heinrichs testified that while hospitals are primarily geared to medical ends, the main function of nursing and retirement homes is to assist elderly people to socially adapt and get on with living. Mr. Heinrichs noted that when designing facilities for the elderly, he attempts to express a residential feeling and character.

29. As already noted, the task facing the Board is to determine whether the Baker Centre comes within the residential or the ICI sector of the construction industry. At one time, most building construction was viewed for collective bargaining purposes as a single division within the construction industry. However, in the 1960s there developed a move in the Toronto area towards treating building construction differently depending on whether it was residential or ICI. In 1971 the *Labour Relations Act* was amended to allow for the accreditation of employer organizations as the bargaining agent for employers in one or more sectors of the construction industry. The term sector was defined in what is now section 117(e) of the Act. This section, which is set out below, makes it clear that residential and ICI construction come within different sectors of the construction industry.

117. In this section and in sections 118 to 136,

- (e) sector means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

30. Although section 117 provides that sectors are divisions of the construction industry as determined by work characteristics, in fact both the residential and ICI sectors share many of the same work characteristics. In large measure, it is the existence of these shared work characteristics which lead to disagreements as to whether certain projects come within the residential or the ICI sector. These shared work characteristics also facilitate the movement of construction firms, including concrete forming contractors, between the two sectors.

31. In 1978, the *Labour Relations Act* was amended to consolidate bargaining structures in the ICI sector and to specify what collective agreements could be applicable within the sector. This, in turn, made it increasingly important that employers and trade unions active in the construction industry be able to ascertain the limits of the ICI sector. The Legislature

sought to accomplish this result through the introduction of section 150, which allows parties to ask the Board to determine whether any particular work is within the ICI sector.

32. In the *West York* case, the Board was also asked to draw a dividing line between the residential and ICI sectors of the construction industry. In that case, the Board indicated that in instances where it is not clear what sector a construction project comes within, the Board will look to local area practice to see how trade unions and employers regard the work. In the *West York* case the Board found persuasive the fact that the type of projects in dispute were widely regarded as coming within the residential and not the ICI sector. With respect to the Baker Centre, however, while some general contractors have approached this type of project as being within the ICI sector, others have regarded it as being within the residential sector. Further, a substantial number of non-union general contractors and owners acting as their own general contractors have performed the work in circumstances where it mattered not to them whether the work was viewed as ICI or residential. As indicated earlier, while the involvement of forming companies belonging to the Ontario Form Work Association might suggest that the construction of nursing and retirement homes is regarded as residential work, given that the collective agreement binding on these companies is multi-sector in scope and has been applied to the construction of a number of what are clearly ICI buildings, no such general conclusion can be reached. In these circumstances, we are led to conclude that there is, in fact, no generally accepted local area practice to assist us in making a determination as to what sector the work on the Baker Centre comes within.

33. In addition to the *West York* case we were referred to the decision of the County Court in *Re Attorney-General of Ontario and Tufford Rest Home* (1980) 30 O.R. (2d) 636. That case involved a question of whether a privately owned nursing home being operated as a profit making venture was an institution within the meaning of the *Public Institutions Inspection Act, 1974* such as to be subject to an inspection by a panel established under that Act. The Court concluded it was not, reasoning as follows:

It would appear that the connotation of institution bears with it the concept of it having a public object. The evidence was that the private company operating the nursing home in this instance had the object of operating a nursing home for private profit. I hold that the concept of private profit is alien to the generally-accepted meaning of an institution. I note as well that the Act is entitled, in s.9, as The *Public Institutions Inspection Act, 1974*. (Emphasis added.) Accordingly, the concept of institution having a connotation of a public object, as distinguished from a private enterprise, is reinforced by the adjective public used in the title to the Act.

I accordingly hold that privately operated nursing homes are not institutions within the meaning of s.4 of the *Public Institutions Inspection Act, 1974*.

34. This case was submitted to the Board by counsel for the MTABA and Sword Contracting in support of the proposition that a nursing home is not an institution. The issue before the Court in that case, however, was a fairly narrow one, and not directly related to the issue before the Board. Further, the decision of the Court appears to have been that the nursing home in question was not an institution because it was a commercial undertaking with the object of private profit. The Baker Centre, however, is not being carried on for profit. Rather, it is a non-profit organization whose purpose is to serve the community in which it is located. Further, both commercial operations and institutions fall within the ICI sector of the construction industry. Given these considerations, we do not believe the *Tufford Rest Home* case to be of much assistance in these proceedings.

35. We thus find ourselves in a situation where we are required to determine what sector of the construction industry work on the Baker Centre comes within with little assistance from any generally accepted construction industry practice or the case law. We are of the view that the distinction drawn by Mrs. Cluff between the medical or institutional model of care and the social model is not a very useful one for our purposes. As Mrs. Cluff noted, the difference is essentially one related to the philosophy of management of a facility and its philosophy of care. To be meaningful as far as the construction industry is concerned, however, parties must be able to assess what sector work will come within prior to the commencement of the work, not after the work is completed and the facility in question operational. What we can draw from the evidence of Mrs. Cluff is that in Ontario there is a growing tendency to seek to ensure that residents of nursing and retirement homes will have as much autonomy as possible in their daily lives, and that such facilities are increasingly being designed with this goal in mind.

36. A number of witnesses, including Mr. Chatfield and Mr. Heinrichs, expressed the view that nursing and retirement homes are residential because people live in them, and the comfort of the residents is a major concern. The fact that elderly people reside in such facilities also accounts for the role of the CMHC in financing facilities such as the Baker Centre. However, while the fact people reside in a facility is one factor that suggests that the construction of the facility comes within the residential sector, it is not by itself necessarily determinative. People reside in a number of facilities that do not come within the generally understood meaning of the term residence. For example, servicemen may reside in army barracks and convicted criminals reside in correctional facilities, and yet it is questionable whether the construction of either of these types of facilities involves work coming within the residential sector of the construction industry.

37. In assessing what type of construction does come within the residential sector, the logical place to start is with the construction of a single family home to be owned by the family that will be residing in it. Such construction clearly comes within the residential sector. When one moves away from this clear-cut example, however, the matter becomes more complex. For example, it might be argued that the construction of a rental apartment building should be viewed as commercial construction because the owner intends to operate the facility to make a profit. On the other hand, however, once an apartment unit is rented out it becomes someone's home in the generally accepted use of that term. The residents carry out their activities of daily living in a physical area they have a tenancy interest in, and immediate control over. There has grown up a clear and generally accepted practice in the Toronto area of treating the construction of apartment buildings as coming within the residential and not the ICI sector of the construction industry. Based on this practice, the Board has in the Toronto area recognized such construction as coming within the residential sector. Indeed in the *West York* case, on the basis of a generally accepted local practice, the Board concluded that a building built by an institution but comprised primarily of self-contained apartment units also came within the residential sector. The Baker Centre is, however, even further removed from the example of the single family home. Although accommodation will be provided at the Centre, it will not be in self-contained units. Rather, individuals will be required to conduct a major part of their activities of daily living, including eating and bathing, in shared areas not under their direct control. No matter how concerned staff might be about giving residents as much autonomy as possible, it seems reasonable to assume that residents will have to conform to certain rules and norms relating to matters such as meal times. In the nursing home portion of the Centre, residents will be receiving daily nursing care under the direction

of a professional nursing staff. Staff working in both the retirement and nursing home portions of the Centre will not be under the immediate direction of the residents, as would be the case of domestics employed in a home, but rather under the direction of a company hired for the express purpose of managing the Centre.

38. In the health care field the word institution has developed a negative connotation, primarily because it connotes a medical model of care where an individual loses more autonomy over his daily living activities than is necessary. However, outside the health care field, the word institution has a much more neutral connotation. The term is generally used to refer to an organization established to provide a service viewed as being of benefit to either the public at large, or to some specific group. For example, schools, universities and churches are generally viewed as institutions. In this sense of the word, we also view the Baker Centre as an institution. It is a non-profit organization formed in part for the socially beneficial purpose of providing facilities for the elderly who are unable or unwilling to live independently. Through an outside management firm and a fairly large staff of employees, the Centre will be providing nursing care and other forms of assistance to its elderly residents. The Centre will also house day care facilities for children and elderly persons. The Baker Centre is held out to the public as being associated through the Northwestern Health Centre with the Northwestern General Hospital. The bylaws of the Baker Centre require that a majority of the directors of the Centre, including the chairman, either be connected with the Northwestern General Hospital or be approved by the board of directors of the Hospital. Given all of these factors, we are satisfied that the construction of the Baker Centre does come within the industrial, commercial and institutional sector of the construction industry as that term is used in the *Labour Relations Act*.

39. In reaching this determination, we do not wish to be taken as saying that it is preferable that one group of companies or trade unions, as opposed to some other group, be involved in constructing facilities such as the Baker Centre. Nor are we in any way indicating a view with respect to the involvement of members of the Ontario Form Work Association on ICI sector projects. Those are matters outside the scope of the question before us, namely, whether or not the construction of the Baker Centre is work within the ICI sector of the construction industry. As already indicated, in our view, it is.

40. As noted at the outset, this matter commenced as a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. The Registrar, in consultation with the parties, will re-list the matter for hearing with respect to all outstanding matters.

41. This panel is not seized of any outstanding issues.

3427-84-R United Steelworkers of America, Applicant, v. Temspec Inc., Respondent

Bargaining Unit – Certification – Employee returning from childbirth doing part-time work for short period by mutual consent – Isolated instance not constituting listing of employing part-timers – Policy re part-timers and students reviewed

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

DECISION OF THE BOARD; May 27, 1985

1. In a decision dated April 19, 1985 in respect of this application for certification, the Board wrote, in part, as follows:

3. With respect to the bargaining unit, the parties are in dispute as to whether persons regularly employed for not more than twenty-four hours per week should be excluded from the bargaining unit, as submitted by the respondent. After hearing the submissions of the parties with respect to that issue, the Board indicated in an oral ruling that, subject to its usual second check, the Board would certify the applicant pursuant to section 6(2) of the Act, pending the final resolution of that issue. We made that ruling because we were satisfied that the applicant's right to certification could not be affected by the Board's ultimate decision as to the inclusion or exclusion of persons regularly employed for not more than twenty-four hours per week.

• • •

5. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act and pending the final resolution of the composition of the bargaining unit, hereby certifies the applicant as bargaining agent for all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, engineering technicians, office and sales staff, students employed during the school vacation period, and, pending the final determination of the matter in dispute, excluding as well persons regularly employed for not more than twenty-four hours per week.

6. A formal certificate must await the final bargaining unit determination.

2. As indicated in that decision, the sole issue remaining in dispute between the parties is whether or not persons regularly employed for not more than twenty-four hours week (also referred to in this decision as part-time employees, for ease of reference) should be excluded from the bargaining unit. The current practice of the Board in this regard was delineated as follows in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. March 324:

6. The Board's tendency, at least in recent times, has been to link students with part-time employees in order to make available to students a second bargaining unit, apart from the full-time unit, which will have some viability as a bargaining structure. The problem with the agreement of the parties in the present case is that future part-timers (if any) are, by the lack of an exclusion, automatically subsumed within the bargaining unit created by this application, leaving the students no opportunity to form a subsequent bargaining unit composed of any employees other than themselves.

7. The Board gave careful consideration to this problem in *Plummer Memorial Public Hospital*, [1979] OLRB Rep. May 433. There, the application was for a unit of part-time employees, from which both parties agreed to exclude students employed during the school vacation period. The Board had this to say:

Where students employed during the school vacation period are excluded from a bargaining unit of full-time employees and an application for part-time employees is filed it is the practice of the Board to include both the part-time employees and the students employed during the school vacation period in the bargaining unit. The Board's practice is predicated upon its belief that students employed during the school vacation period could not form a viable bargaining unit standing alone and even if they could, the result would be to create an unduly fragmented situation. While the Board is receptive to agreements of the parties in respect of bargaining unit descriptions it will not accede to these arrangements where the result is to do violence to its policies. The Board is of the view that the agreement of the parties in this case to exclude students employed during the school vacation period from a unit of part-time employees would do fundamental violence to the policy of the Board in this regard . . .

Accordingly, the agreement of the parties was rejected, and the applicant was certified for a bargaining unit composed of both part-time employees and students employed during the school vacation period.

8. As *Plummer* was the first clear articulation of the Board's policy not to sever part-time employees and students, even where the parties agree, the Board accepted an agreement of the parties to exclude students from a part-time unit in *The Regional Municipality of Peel*, Board File No. 0919-79-R, a case already before the Board at the time the *Plummer* decision was issued. Since that time however, the Board has been quite rigid in its adherence to the tandem principle with regard to part-time employees and students. Thus in *Dominion Steel Export Co. Ltd.*, [1979] OLRB Rep. Oct. 953, the Board excluded both students and part-time employees from a full-time all employee unit, even though the employer had a history of employing students only, and not part-timers. And in *Banvil Limited* (unreported – Board File No. 1052-79-R), a case exactly analogous to the present one, the parties had agreed to exclude students but not part-timers from a full-time bargaining unit, on the basis that the employer had a history of hiring only the student category. Notwithstanding the agreement of the parties, the Board applied the tandem principle and described the full-time bargaining unit so as to exclude both students and part-time employees.

9. It must be recalled that *Plummer* dealt with a part-time application. As can be seen, however, the Board's concerns expressed in *Plummer* over the availability for students of a viable bargaining structure (as well as the potential for fragmentation), have led the Board in subsequent instances to exclude from a full-time bargaining-unit description a non-existent category, i.e. part-time employees, contrary to its normal aversion to such a practice, and even to the agreement of the parties. Accordingly, the Board is of the view that its tandem principle relating to part-time employees and students ought to be less rigidly applied, and will do so both in dealing with full-time and with part-time applications. Where the parties are able to agree on the part-time/student question, whether it be to combine or sever the two groups (and whatever the employment history may be), the Board will, in the absence of special circumstances, accept that agreement.

10. Where there is a history of hiring only one or the other of the two groups, the Board will tend, in the absence of agreement by the parties, to exclude the existent, but not the non-existent group from a full-time unit. Where, however, a full-time unit excludes part-time employees and students, and an application is made for the part-time unit, the Board (again in the absence of agreement by the parties) will tend to keep the two categories combined, even though only one exists, in order to avoid undue fragmentation.

11. Similarly, where both groups exist and there is no agreement between the parties, the Board will likely treat the two groups in tandem, having regard to the community of interest which often exists between the two, as well as the usual concern over fragmentation.

The rationale for the Board's approach in this area was outlined in the following passage from *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330:

6. The Board's general practice concerning exclusion of part-time employees and students from full-time bargaining units is set forth in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324. (See also *The Post Printing Company Ltd.*, a division of *Thomson Newspapers Limited (Leamington)*, [1966] OLRB Rep. Mar. 930; *Premier Plastics Limited*, [1969] OLRB Rep. July 508; *Wilson-Munroe Company Ltd.*, [1973] OLRB Rep. Dec. 647; and *The Beacon Herald of Stratford Limited*, [1975] OLRB Rep. Feb. 103.) This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, and full-time employees, on the other hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability and other benefit plans; extensive seniority clauses; and other long-term benefits. See, for example, *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, paragraph 5, in which the Board stated:

... we have learned through experience in such applications that part-time employees do not share a community of interest with full-time employees in many aspects of the collective bargaining scenario. More precisely part-time employees are more pragmatically concerned with immediate as opposed to long-term benefits with respect to improving their terms and conditions of employment. In applying this proposition to more practical issues the part-time employee usually prefers to sacrifice long-term pension, medical and other welfare benefits for a more substantial increase in wages or a longer vacation period. The nature of seniority provisions contained in a collective agreement with respect to promotions, transfer and lay-offs does not always assume the same degree of significance to the part-time employee as it would to the full-time employee. In other words, the Board has discerned a natural, inevitable schism in measuring the community of interest between the two categories of employees that invite separation into peculiar bargaining units ...

7. For the foregoing reasons, part-time employees and students generally tend to have less initial interest in collective bargaining. Moreover, since the union organizing campaign may give rise to considerable uncertainty and apprehension among part-time employees and students with respect to the continued accommodation of their particular needs and desires for a convenient work schedule and maximum short-term remuneration, they are prone to oppose applications for certification. Such opposition could preclude full-time employees from engaging in collective bargaining if the Board generally exercised its discretion under section 6(1) of the Act in favour of bargaining units which included not only full-time employees but also part-time employees and students. Accordingly, the Board's practice concerning part-time employees and students is not only a policy designed to avoid difficulties which may arise where groups with separate communities of interest are included in a single bargaining unit, but is also an organizing rule which promotes the public interest, identified in the preamble of *The Labour Relations Act*, in furthering harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

(See also *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713.)

3. It is common ground between the parties that the respondent has a history of employing students ... during the school vacation period and that, in accordance with the Board's usual practice, they should be excluded from the bargaining unit. However, as indicated above, the parties have been unable to reach a similar agreement in respect of part-time employees. They have, however, agreed upon the facts which the Board should take into account in determining whether the employer has a history of part-time employment. An individual who had been regularly employed by the respondent for more than twenty-four hours per week was given time off work to have a baby. When she returned to work, she was regularly employed for not more than twenty-four hours per week on the mutual consent of herself and the respondent. She later returned to full-time employment (i.e., she was again

regularly employed by the respondent for more than twenty-four hours per week). She was a full-time employee on March 22, 1985, the date of the instant application, and had been for the preceding two or three months.

4. Counsel did not refer the Board to any Board decisions or other sources which are of assistance in determining whether the foregoing is sufficient to constitute a history of part-time employment, nor has the Board's independent research disclosed any such material. However, having carefully considered the submissions of the parties, we have concluded on balance that the facts set forth above do not justify the exclusion of part-time employees from the bargaining unit in the present case, as an isolated instance in which a person who has been employed on a full-time basis prior to her confinement is permitted to work less than twenty-four hours per week for a period of time before returning to full-time employment does not, in our view, constitute a history of part-time employment.

5. For the foregoing reasons, the Board, in the exercise of its discretion under section 6(1) of the *Labour Relations Act*, hereby finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, engineering technicians, office and sales staff, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. A formal certificate will now issue to the applicant for that bargaining unit.

2360-84-U Michael Baranowski, Complainant, v. Teamsters Union Local 938, and TNT Canada Inc. carrying on business as **TNT Railfast**, Respondents

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Unfair representation complaint only naming union as respondent – Union’s motion for dismissal because of delay dismissed – Complainant subsequently adding as respondent and seeking relief against employer – Claim for relief against employer dismissed because of delay

BEFORE: *Harry Freedman*, Vice-Chairman.

APPEARANCES: *A. W. Klymko* and *Michael Baranowski* for the complainant; *L. Bertuzzi*, *R. Wilson*, *C. Roberts* for the respondent TNT Railfast; *Ken Petryshen* and *Jim White* for the respondent Teamsters Union Local 938.

DECISION OF THE BOARD; May 13, 1985

1. The Board issued the following oral decision at its hearing on May 7, 1985:

This is a complaint under section 89 of the *Labour Relations Act*, alleging a violation of section 68 of that Act.

The complainant has added TNT Canada Inc. carrying on business as TNT Railfast as a party respondent. TNT Canada Inc. purchased Interline Forwarders in October of 1983. The complainant was dismissed from his employment with Interline Forwarders in April of 1983. The respondent union advised the complainant in May and June of 1983 that it was not going to pursue the issue of his discharge through to arbitration. This complaint was filed with the Board on November 27, 1984 and named only the union as a respondent. The respondent TNT was not added as a party to this proceeding and did not receive notice of this proceeding until March of 1985.

The first hearing in this matter, which came before another Vice-Chairman of the Board, dealt with the union’s preliminary submission that the Board should exercise its discretion to refuse to entertain the complaint because of the extreme delay from the time the complainant’s cause of action arose to the time the complaint was filed with the Board. The Board dismissed the union’s preliminary motion for reasons set out in its decision dated January 29, 1985.

When this matter came before me, the respondent TNT submitted that the complaint, insofar as it seeks a remedy against TNT, ought to be dismissed because of the unreasonable delay of the complainant in seeking a remedy against it. TNT was not ever the employer of the complainant. It purchased Interline Forwarders, the former employer of the complainant, in October of 1983, some five to six months after the complainant was dismissed from his employment. The two management people who were employed by Interline at the terminal where the

complainant had worked prior to his dismissal left their employment, one in the summer of 1983, and the other left the employ of TNT in June of 1984. The respondent TNT claims it is prejudiced by the length of time that has passed in this matter.

The complainant's explanation for the delay is that he went to see a lawyer in July of 1983 who did nothing for him. He left that lawyer in December 1983. He took no active steps to pursue the matter of his discharge from Interline with either the respondent union or the respondent TNT until some time in the summer of 1984, when he came to the Ministry of Labour, received some information about the collective agreements between the Teamsters and Interline and some information about the *Labour Relations Act*. He also went to legal aid and then subsequently retained his present legal counsel.

It is clear to me that the delay in proceeding against the respondent TNT is approximately 21 months. That delay is extreme.

The Board in *Sheller-Globe of Canada Limited*, [1982] OLRB Rep. Jan. 113 held that a delay of some 30 months was extreme. In my view, so is 21 months. In that case the Board said at page 116-7:

A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it, requiring the litigation of certain events, remains pending.

In this case, neither Interline nor the respondent TNT had notice that the complainant was seeking any relief against it until it was added as a respondent in March of 1985.

In the earlier decision in this matter, the Board stated at paragraph 15:

In determining whether there has been excessive delay in filing complaints under this section, Boards [sic] have considered the complainant's reasons and any potential prejudice to the respondent. Prejudice is viewed in terms of adverse effects on the respondent's defence or on its bargaining relationship. Where significant prejudice to the respondent *could* result, the onus shifts to the complainant to produce *compelling labour relations reasons for the delay*: *Sheller-Globe of Canada Limited*, [1982] OLRB Rep. Jan. 113.

[emphasis added]

I am satisfied that there is a significant degree of prejudice to TNT, who may be called on to explain the actions taken by persons who were not its employees at the time of the incident in question and who are no longer its employees now. I am persuaded that those factors, together with the undeniable prejudice described by the Board in the *Sheller-Globe* case requires the complainant to come forward with compelling labour relations reasons for the delay in seeking relief against the respondent TNT.

The complainant has not done so. The complainant retained counsel, who was not counsel before me, shortly after he was dismissed from his employment with Interline. At that point, some legal process against his former employer could have been explored. No steps were taken by his counsel, because the complainant was not able to pay him. Almost a year passed after he had terminated his relationship with his first counsel before this complaint was filed with the Board, and another three to four months had passed before TNT was added as a respondent. The complainant's attempts to secure legal advice do not, in my view, provide compelling labour relations reasons for the delay in naming TNT as a respondent. My decision in this matter would have been the same had TNT been named as a respondent in November of 1984, since whether the delay was 18 or 21 months, it was extreme.

For these reasons, the claim for relief against the respondent TNT is dismissed.

The Board will, of course, in determining the appropriate remedy, if any, consider the submissions of the parties as to the nature and degree of the remedy in light of the complainant's delay in instituting this complaint against the respondent union and this ruling in dismissing the complaint as against the respondent TNT.

2. Following the Board's ruling in this matter, the parties agreed that this matter should be adjourned. Accordingly, having regard to the agreement of the parties, this matter is adjourned to a date to be fixed by the Registrar.
 3. This panel of the Board is not seized with this matter.
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0155-85-R Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Usarco Ltd.**, Respondent

Practice and Procedure – Representation Vote – Prior pre-hearing application withdrawn – Union using cards in second pre-hearing application despite employee request to return cards – Challenge to adequacy and integrity of membership evidence not requiring hearing prior to direction of pre-hearing vote

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *C. A. Ballentine* and *F. W. Murray*.

DECISION OF THE BOARD; May 6, 1985

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. By decision dated April 22, 1985, the Board appointed a Labour Relations Officer to confer with the parties and review, among other things, the description of the voting constituency and the records of the applicant and respondent to obtain the information necessary for the Board to determine whether the applicant has passed the threshold requirement contained in section 9(2) of the Act.
4. At the meeting with the Labour Relations Officer, the parties agreed to the following voting constituency:

all employees of the respondent at Hamilton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.
5. Prior to the meeting, counsel for a group of employees filed the following letter with the Registrar:

April 26, 1985

Ontario Labour Relations Board
400 University Avenue
4th Floor
Toronto, Ontario
M7A 1V4

Attention: Registrar

Dear Sir/Madam:

Re: Board File No. 0155/85/R
Teamsters Local 879 and
USARCO Ltd.

Please be advised that we have been retained by nine individuals who are employees of USARCO Ltd. Our clients have advised us of a prior application for certification filed by Teamsters Local 879, which application we understand was in due course dismissed by the Board.

Our clients have advised us that subsequent to the dismissal of the application they requested the appropriate union official to return to them their union cards as none of them wished any longer to be members of the union. They were advised that the cards would be returned to them but as of this date no such cards have in fact been received.

My clients have further advised me that they understand a new application for certification is now pending. It is their belief that Teamsters Local 879 is relying, in part, upon the membership cards which they had previously signed but has, as noted above, requested the return of. It is the position of my clients that Teamsters Local 879 ought not to be able to rely upon those cards and that it should be directed to return those cards to the named individuals.

For the assistance of the Board I act on behalf of . . . If any further information or assistance is required, please contact me at your convenience. I shall await further direction from the Board as to the manner in which it intends to proceed given this stated position of my clients.

Yours very truly

David E. Ivey

6. Counsel for the employer also filed the following letter with the Board:

May 1, 1985

DELIVERED BY HAND

D. K. Aynsley, Esq.
Registrar
Ontario Labour Relations Board
400 University Avenue
4th Floor
Toronto, Ontario
M7A 1V4

Re: Teamsters Local Union No. 879

and Usarco Ltd.

Board File No. 0155-85-R

Dear Mr. Aynsley:

We are the solicitors for the respondent in the above-captioned matter. This morning we received from the Board a copy of a letter sent on behalf of nine employees of the above-named respondent. As that letter points out, the Teamsters have already made an unsuccessful application to the Board for certification. That application was dismissed by the Board (see O.L.R.B. File No. 3389-84-R). At the pre-vote meeting it was clear that the applicant did not have a clear 35% required for a pre-hearing vote. The applicant, therefore, after seeing the list, asked the Board to allow them to withdraw their application. The Board did not allow them to withdraw but instead dismissed the application.

The letter on behalf of nine employees indicates that after the application had been dismissed, the nine employees approached the Union to request the return of their cards. They allege that

they were informed that their cards would be returned. The cards were not returned and we suspect that these nine cards are now being used as part of the membership evidence in the above-captioned certification application. It is our submission that in light of all the facts and circumstances of this case the Board ought not to consider the application and ought to exercise its discretion and refuse to entertain this application. In the alternative, it is our submission that the nine aforementioned cards ought not to be available as membership evidence to support the 35% requirement for a pre-hearing vote. We therefore request that prior to establishing any pre-hearing vote the Board conduct a hearing in respect of this matter.

Should you wish to discuss the matter further, please do not hesitate to contact me.

Yours very truly,

STRINGER, BRISBIN, HUMPHREY

Per: Mark E. Geiger

Dictated but not read.

Counsel for the employer renewed his submissions concerning the conduct of this matter at the meeting with the Labour Relations Officer. He also advised the Officer that he was looking into information received from his client that several employees did not pay any membership fee to the applicant and were told that the applicant would pay those fees.

7. We do not believe that the allegations made by counsel for the group of employees or by counsel for the respondent should cause the Board to schedule a hearing prior to conducting a pre-hearing representation vote. The Board's practice in this area has been recently set out in *St. Clair College of Applied Arts and Technology* [1984] OLRB Rep. Dec. 1776 at 1776-1777:

The respondent submitted in its reply, by way of preliminary objection to the application, that the Board does not have the jurisdiction to deal with this application and requested that the Board conduct a hearing to decide the jurisdictional issue before a meeting is held with a Labour Relations Officer or a pre-hearing vote is conducted. The Labour Relations Officer was authorized by the Board's November 23rd decision to convene a meeting of the parties and such a meeting was held despite the objection taken to the procedure by the respondent. At that meeting, the respondent renewed its preliminary objection to the jurisdiction of the Board to process this application and advised the Labour Relations Officer that it was participating in the meeting and vote arrangements without prejudice to its position that the Board did not have the jurisdiction to order a pre-hearing vote, and further that no vote be conducted until the jurisdictional issue is determined by the Board after a hearing is conducted.

An application for certification can give rise to a large number of issues, some of which can be characterized as jurisdictional, and those issues that remain in dispute will be resolved by the Board after a hearing is conducted where all parties affected are given the opportunity to present their evidence and make their submissions to the Board (see section 102(13) of the *Labour Relations Act*). We do note, however, that the Board need not conduct a hearing into applications for certification relating to the construction industry, pursuant to section 102(14) of the Act. The Board directs a representation vote in an application for certification filed under section 7 of the Act, only after a hearing where issues similar to the one raised by the respondent in this case are dealt with. However, an application for a pre-hearing vote is processed in a different manner. Unless the Board is of the opinion that the pre-hearing vote

application gives rise to concerns or issues that are so complex that there is no reasonable utility in conducting a vote before resolving those concerns or issues, the Board directs the taking of a pre-hearing vote. Where such complex concerns or issues are raised, the Board has the discretion under section 9(1) of the Act and section 5 of the Board's Rules of Procedure to refuse to entertain the pre-hearing vote application and direct it to be processed in the usual way. (See *Central Hospital*, [1982] OLRB Rep. March 347 at 348; *Howard Furnace Ltd.*, [1961] OLRB Rep. July 98.)

The pre-hearing vote procedure exists to permit the Board to promptly conduct a vote among the employees who are subject to the application for certification. (See *Emery Industries Ltd.*, [1980] OLRB Rep. March 316 at page 319; *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. April 468 at pages 483-484; *Central Hospital*, *supra*; *Savette Family Department Store Ltd.*, [1974] OLRB Rep. May 327; *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989.) The jurisdictional issue raised by the respondent in this case, and in our view, the vast majority of issues that might be raised in relation to a pre-hearing vote application for certification need not be decided by the Board before the pre-hearing vote is conducted. We adopt and apply the reasoning of the Board in *Satin Finish Hardwood Flooring Limited*, Board File No. 1851-84-R, November 8, 1984, as yet unreported, in which the Board wrote a paragraph 10:

While it is necessary for the Board to know the parties' positions on relevant issues before it can make the determinations contemplated by subsection 9(2) of the Act, it is not necessary for the Board to resolve their differences on those issues before making those determinations. Because the Board need only identify and delineate the conflicts rather than resolve them, it is only the most unusual case in which the officer's report on his meeting with the parties will be an insufficient basis on which to make the determinations called for by subsection 9(2). Although it is not in this case, it may occasionally be necessary for the panel to consult directly with the parties, rather than receive their positions through the officer or in writing, there should never be a necessity for a formal pre-vote evidentiary hearing in a pre-hearing vote proceeding. There may well be cases in which the issues of fact and law raised by the parties are so complex that some or all of them must be resolved before there can be any potentially beneficial resort to a representation vote. The appropriate response in such cases is to decline to exercise the discretion to order a pre-hearing representation vote and, instead, direct that the application be processed in the ordinary manner: see *Howard Furnace Limited*, [1961] OLRB Rep. July 98. We do not feel that the issues raised in this case require that response.

Thus, we are of the view that the respondent's preliminary objection is not a sufficient basis for us to refuse to process the application for certification under section 9 of the *Labour Relations Act*.

8. The submissions made in this case relate to the adequacy, weight and integrity of the documentary evidence of membership that the applicant relies on in support of its application. In our opinion, those issues are precisely the kinds of issues which should be dealt with at a hearing *after* the pre-hearing vote is conducted. Indeed, section 9(4) of the Act requires the Board to determine whether the requisite number of employees were members of the applicant as of the application date *after* the vote is conducted, whereas section 9(2) only requires an appearance of a requisite amount of membership based upon the documentary evidence filed by the applicant in order to direct a pre-hearing representation vote. We simply do not view the resolution of those issues as a condition precedent to the taking of a pre-hearing representation vote.

9. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

10. All employees of the respondent in the voting constituency on the 2nd day of May, 1985, who have not voluntarily terminated their employment or who have not been discharged for cause between the 2nd day of May, 1985, and the date the vote is taken will be eligible to vote.
 11. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
 12. The Board directs that the ballot box be sealed.
 13. This panel of the Board is not seized with this matter.
 14. The matter is referred to the Registrar.
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0264-84-R Ontario Secondary School Teachers' Federation, Applicant, v. **The Board of Education for the City of York**, Respondent, v. Ontario Public Service Employees Union, Intervener

Bargaining Unit – Certification – Practice and Procedure – Trade Union – Trade Union Status – Principals exercising managerial functions members of applicant – Fact that applicant not composed exclusively of employees not depriving trade union status – 30/30 rule not appropriate to determine composition of unit of occasional teachers – Those at work on application date or those on actively interested list who worked at least one day during 12 months preceding application included – Considering dispersed constituency Board directing disclosure of names and addresses of eligible voters to all parties to proceeding

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *F. W. Murray* and *S. Cooke*.

APPEARANCES: *Maurice A. Green*, *Fred Burket* and *Jim Forster* for the applicant; *D. W. Brady*, *Steven Moate*, *B. H. Stewart*, *Q.C.* and *Ian Baker* for the respondent; *Chris G. Palliare*, *Ivor Oram*, *Barbara Linds* and *Bruce Ryder* for the intervener.

DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER S. F. COOKE; May 6, 1985

I

1. This is an application for certification. It is a first of a series of similar applications now before the Board, arising out of efforts by "occasional teachers across Ontario to form or join a trade union. The term occasional teacher is defined in section 1 of the *Education Act*, R.S.O. 1980, c.129, as amended, as follows:

occasional teacher means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who was absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year.

Occasional teachers are also commonly referred to as supply teachers. For ease of reference we will adopt the parties' jargon and refer to the regular teachers whom the occasionals replace as contract teachers.

2. In a number of the certification applications pending before the Board, including the present one, occasional teachers have indicated an interest in being represented by the Ontario Secondary School Teachers' Federation (OSSTF). Under the *School Boards and Teachers Collective Negotiations Act 1975* (Bill 100) [now R.S.O. 1980 c.464], OSSTF is the collective bargaining representative of some 35,000 secondary school teachers employed by various local boards of education across the province. Accordingly, it is hardly surprising that the occasional teachers might regard OSSTF as the vehicle through which they could best achieve their own collective bargaining aspirations. But therein lies a problem. The OSSTF membership includes about 1,500 principals and vice-principals who are required, by statute, to be members of OSSTF (see section 64 of Bill 100). The respondent takes the position that these individuals exercise managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act* and that, therefore, OSSTF is not a trade union within the meaning of the *Labour Relations Act*. In the respondent's submission, since OSSTF is not a trade union, it cannot be certified to represent occasional teachers. It does not matter that the majority of the occasional teachers may well want to be represented by OSSTF. Their wishes are irrelevant because, as a matter of law, OSSTF is not permitted to represent them. The respondent's legal position is supported in this case by the intervener, the Ontario Public Service Employees Union (OPSEU) which also asserts that OSSTF is not entitled to represent occasional teachers. OPSEU claims that right for itself.

3. This application was made pursuant to section 9 of the *Labour Relations Act* which sets out the procedure for the taking of a pre-hearing representation vote. By a decision dated May 23, 1984 and, on the agreement of the parties, the Board directed a representation vote in the following voting constituency:

All occasional teachers employed by the respondent in its secondary panel in the City of York, save and except persons covered by subsisting collective agreements.

Voters were asked to signify whether or not they wished to be represented by the applicant OSSTF or the intervener OPSEU, or no union at all in their employment relations with the respondent. The ballot box has been sealed pending a resolution of the various issues and objections raised by the respondent and the intervener.

4. We have already identified one of these issues: whether OSSTF is a union under the *Labour Relations Act* which is entitled to represent occasional teachers, or to put the matter from another perspective, whether the choice of bargaining agents open to occasional teachers includes OSSTF. If it does not, then OSSTF could not properly appear on a ballot. A second but equally important question is how to determine the *composition* of the bargaining unit – that is the number and identity of the individuals whose wishes are to be canvassed in the certification process. This problem arises because of the casual and sporadic nature of the occasional teachers' employment, since, from a purely common law point of view, it could well be argued that many of the occasional teachers should not be considered employees at all except when they are actually working. They are simply *prospective* or *potential* employees whom the respondent might choose to engage as its needs require. They would not be considered employees in the bargaining unit at the time the application is made unless they were literally, actively at work on the application date. However, none of the parties urged the Board to interpret section 9 solely in terms of the common law *indicia* of employment. All of the parties asserted that the Board should adopt an interpretation that made collective bargaining sense in the rather novel circumstances of this case. Unfortunately, the proposed tests were different.

II

5. It is common ground that the labour relations and collective bargaining of occasional teachers is regulated by the *Labour Relations Act*. They are not teachers as defined by Bill 100; hence they are not excluded by section 2(f) of the *Labour Relations Act* [see: section 230 of the *Education Act*, and section 1(l)(m) of Bill 100]. The result is that the occasionals fall under the *Labour Relations Act*, while those whom they replace are covered by Bill 100. As a matter of background, it may be useful to refer to some of the special features of Bill 100 which were outlined by the Board in another very recent case involving OSSTF and the respondent board of education. In *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279 (the *Humewood House decision*) the Board had this to say:

20. The *School Boards and Teachers Collective Negotiations Act* was enacted in July of 1975. Before its enactment, no special or general legislation regulated collective bargaining between teachers and school boards in Ontario. Collective bargaining did, however, take place between them (see J. Douglas Muir, *Collective Bargaining by Canadian Public School Teachers*, Task Force on Labour Relations Study No. 21 (Ottawa: Information Canada, 1968); Bryan M. Downie, *Collective Bargaining and Conflict Resolution in Education: The Evolution of Public Policy in Ontario* (Industrial Relations Centre, Queens University, Kingston, Canada, 1978); and Peter Hennessy, *Schools In Jeopardy: Collective Bargaining in Education*, (McClelland and Stewart, Toronto, 1979)). In October, 1970, the Ontario government established a committee of inquiry whose terms of reference were to inquire into, report upon and make recommendations with respect to the process of negotiation between teachers and school boards, including, *inter alia*, the definition of bargaining units. The committee formally known as The Committee of Inquiry Into Negotiation Procedures Concerning Elementary and Secondary Schools of Ontario was chaired by Judge Reville and will be referred to here as the Reville Committee. It prepared a report dated June, 1972 entitled *Professional Consultation and the Determination of Compensation for Ontario Teachers* in which it reviewed the matters referred to for inquiry and set out its recommendations. The committee's recommendation with respect to bargaining unit scope was that the bargaining agent should represent all employees of a board who hold a teaching certificate, except supervisory officers of the school board. The Ontario Teachers' Federation, which took the position that it should be the statutory bargaining agent for teachers, responded to that recommendation this way:

The Federation feels that the Committee's recommendation is not precise enough. For example, the Federation does not feel a responsibility to negotiate the salary of an employee of a board who holds a teaching certificate which is not a prerequisite under the Schools Acts and Regulation for employment – for example, a clerical worker with teacher qualifications who works in a school board's office.

The Federation recommends that the members of a teacher negotiating entity shall include those persons coming under the definition of teacher in the Teaching Profession Act . . . (*Submission to the Minister of Education in Response to the Report of the Committee of Inquiry into Negotiations Procedures*, Ontario Teachers' Federation, June, 1972, p. 6.)

Very few of the Reville Committee's recommendations were implemented in Bill 100. The definition of teacher ultimately adopted in Bill 100 incorporates all of the elements of the definition of that term in the *Teaching Profession Act* and adds for good measure the stipulation that the employee be employed as a teacher. Whether that approach achieved precision might now be a matter of debate.

21. The scheme adopted in Bill 100 was that each teacher employed by a board would be represented by an organization called a branch affiliate consisting of all the teachers employed by a board who are members of the same affiliate. (s. 1(a)). Each of the five affiliates of the Federation is an affiliate. Paragraph 1(m) defines teacher this way:

(m) teacher means a person,

- (i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,
- (ii) who holds a letter of standing granted by the Minister under the *Education Act*,
- (iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month;

The Act applies to all teachers:

3.- (1) This Act applies to all collective negotiations between boards and teachers in respect of any term or condition of employment put forward by either party for the purpose of making or renewing an agreement.

5. A branch affiliate shall, in negotiations and procedures under this Act, represent all the teachers composing its membership.

It also applies to principals and vice-principals, who are members of the bargaining unit, although they are not permitted to strike:

64.- (1) A principal and a vice-principal shall be members of a branch affiliate.

(2) Notwithstanding subsection (1), in the event of a strike by the members of a branch affiliate each principal and vice-principal who is a member of the branch affiliate shall remain on duty during the strike or any related lock-out or state of lock-out or closing of a school or schools.

The Act contemplates the continued significance of the individual contract of employment between the board and a teacher:

54.- (1) An agreement between a board and a branch affiliate shall be deemed to form part of the contract of employment between the board and each teacher who is a member of the branch affiliate.

(2) Where a conflict appears between a provision of any other part of a contract of employment and a provision of the agreement referred to in subsection (1), the provision of the agreement prevails, but no agreement shall conflict with the form of contract prescribed by the regulations under the *Education Act*.

22. The approach to collective bargaining adopted in Bill 100 differs in a number of respects from the approach of the *Labour Relations Act*. There is no provision for certification of bargaining agents or determination of the appropriate bargaining unit; both the bargaining agent and the scope of the bargaining unit are fixed by Bill 100. The parties are not free to determine the commencement and expiry dates of their collective agreement; under Bill 100, collective agreements must become effective on the 1st day of September and expire only on the 31st day of August in a subsequent year. To be effective, notice to bargain must be given in the month of January in the year in which the agreement expires, considerably earlier than would be the case under the *Labour Relations Act*. Bill 100 provides for fact finding, rather than conciliation, as the third party intervention prerequisite to the resort to the sanctions of strike and lockout. In addition to fact finding, section 63 of Bill 100 prescribes a number of other prerequisites to strike or lock-out activity beyond those found in the *Labour Relations Act*, including a vote on the Board's final offer and a strike vote, with both votes conducted under the supervision of the Education Relations Commission, as well as at least five days' written notice to the board of the date on which the strike will commence. Like the *Labour Relations Act*, Bill 100 imposes on each of the parties to collective bargaining the obligation to bargain in good faith and make every reasonable effort to make or renew an agreement. Jurisdiction to assess and enforce compliance with this obligation is assigned to the Education Relations Commission, which is also assigned a number of other duties which have no equivalent in the jurisdiction assigned to the Ontario Labour Relations Board under the *Labour Relations Act*. Bill 100 assigns to the Ontario Labour Relations Board jurisdiction over applications for a consent to prosecute alleged contraventions of the Act (subsection 77(6)),

and applications for declarations and directions with respect to allegedly unlawful strikes and lockouts (section 67).

However, as noted, Bill 100 does not apply to all teachers. Occasionals have been excluded, and, by default fall under the *Labour Relations Act*. It is not clear why they were omitted. There is no indication that the Legislature ever turned its mind to their situation.

6. Bill 100 was an innovative piece of legislation designed to deal with the special needs of a portion of the education sector. But it was not without its critics. On October 24, 1979, when Bill 100 had been in operation a little over four years, the Minister of Education established a Commission of Enquiry (The Matthews Commission) under section 9 of the *Education Act*, for the purpose of reviewing the collective negotiation process between teachers and school boards. Its terms of reference were as follows:

Terms of Reference for the Commission

On completion of their review and inquiry, the Commission shall recommend measures that the Government should consider in relation to collective negotiations for teachers employed in elementary and secondary schools, having in mind the general public good and the rights of teachers to just and equitable remuneration and conditions of employment and include in the report a response to the following specific issues:

- 1) Whether negotiations between school boards and teachers should continue on the basis now provided under The School Boards and Teachers Collective Negotiations Act, 1975 and, if so, what changes, if any, should be made to facilitate the operation of the collective bargaining process in the light of experience to date;
- 2) Whether negotiations should be conducted on some other basis, and, if such other bases are recommended,
 - A) Who should be the parties to the negotiations, and,
 - B) The manner in which the negotiation process should be carried out;
- 3) Whether elementary and secondary school teachers employed by a board of education should negotiate separately or together;
- 4) What restrictions, if any, should be placed by legislation on the items that may be included in collective agreements between school boards and teachers;
- 5) Whether the sanctions available under The School Boards and Teachers Collective Negotiations Act, 1975, are appropriate or whether they should be defined in greater detail.

The Commission shall also consider and make recommendations as to what relationship should exist between the collective agreement and the individual teacher's contract.

It should be noted that the Commission will be examining only the collective negotiation process between teachers and school boards. Its recommendations, if acted upon, may have implications for the collective negotiation process as it now applies to Colleges of Applied Arts and Technology and to the Provincial Schools Authority. If this is the case, the policy in these areas will be reviewed by a separate process.

The Commission's report was submitted on June 18, 1980. It was unanimous on all issues material to this case.

7. The Report comprises some 137 pages, and from our perspective, there are only

two aspects of particular interest. The first is that the Commission explicitly considered the position of occasional, night school, and summer school teachers and recommended that Bill 100 be amended to provide for their inclusion in bargaining units represented by the various teachers' federations [see the discussion at pp.47-48 of the Report]. The Commission also considered whether principals and vice-principals should be full members of the teachers' federations and the bargaining units they represent – an issue that was contentious when Bill 100 was drafted and remained highly controversial. The outlines of what was obviously a spirited debate appear at pages 40-47 of the Commission Report. Ultimately, the Commission concluded that principals and vice-principals should remain in the bargaining unit:

The Commission believes that it is possible that the position of principal would be judged under *The Labour Relations Act* to be a management position and therefore would be excluded from the bargaining unit. However, Bill 100 was enacted in 1975 specifically because it was thought that *The Labour Relations Act* was not suitable for the public education sector.

There have been no amendments to Bill 100 dealing with the position of occasional teachers, or principals and vice-principals. The Legislature chose to maintain the status quo.

8. It may well be (as the Matthews Commission suggests) that the *Labour Relations Act* is not suitable for the public education sector. But for occasionals, it is their only alternative. Although they are qualified teachers they are not included in the bargaining system which covers their professional peers. By default, they fall within the ambit of the *Labour Relations Act*. This creates something of an anomaly. It would be much simpler if one could say that all qualified teachers employed to teach are covered by the general legislation governing teacher collective bargaining. But that is not the case. Some teachers come under the *Labour Relations Act* and in this application we must determine whether the range of bargaining representatives open to occasional teachers under that Act includes OSSTF – the bargaining agent for the teachers whom the occasionals replace, and the entity designated by Bill 100 to represent the interests of secondary school teachers in Ontario. We must also decide how to apply the *Labour Relations Act* to employment relationships which are totally casual.

9. Since there is obviously a need for a definitive answer to these questions, the parties are agreed that this application will be treated as a test case. The principles emerging from it will be useful in resolving the other similar applications currently pending before the Board, which, in many cases, also involve OSSTF (and sometimes OPSEU) and various local boards of education. These cases have been adjourned pending the decision in this one.

10. With this background, then, we turn to the evidence. As it turned out, the facts were not substantially in dispute.

III

11. Occasional teachers are called in to work on an as-needed basis, whenever the regular classroom teacher (permanent, probationary, or temporary) is absent for a temporary period. If a regular history teacher is away for a week with the flu, the school will endeavour to find another history teacher to fill in. It is a matter of securing someone qualified who is available within the required time frame. It is impossible to predict the precise number or identity of the occasional teachers who will work for the board in any given time period, except in the case of a few so-called long-term occasionals who are called upon to replace regular teachers who have died or who are away for a considerable period of time.

12. The employment profile of the occasional teachers employed by the respondent in 1983-1984, bears out the casual and erratic nature of their work relationships. It appears that of the approximately 200 occasional teachers who worked for the respondent, at least one-half worked for fewer than ten days and perhaps a third worked fewer than five days. Only twenty per cent appear to have worked more than thirty days and only about ten per cent of these teachers worked three months or more. And to complicate matters, we might note that of the 81 persons who cast ballots in the representation vote, at least 22 never worked for the respondent at all in the 1983-84 school year – yet they obviously regarded themselves as having some attachment to the respondent and at least sufficient interest to show up to vote.

13. A perusal of the occasional teachers' individual work patterns also reveals considerable variability. For example, in the 1983-84 school year Shirley Binder worked five days: one in September, one in November, and three in January. Monica Ahrens worked five days too: one in April and four in May. She was at work on the day the certification application was made and, therefore, by any test, was an employee in the bargaining unit on the application date. Nelica Bujic worked much more – 39 days between September, 1983, and the end of January, and, accordingly might be said to have a stronger relationship with the respondent than Ms. Ahrens. But Ms. Bujic was not at work on the application date, nor had she worked in the previous three months. Connie Charlton worked fewer days than Ms. Bujic, but worked at least once every month from September, 1983 to June, 1984. She was not at work on the application date. John Pownall worked only three days in the 1983-84 school year; but one of those days was April 27th, the application date, so again, he is clearly an employee in the bargaining unit on any test. The problem is obvious. Who other than those actually at work when the application was made should be treated as an employee in the voting constituency and bargaining unit for the purpose of section 9 of the Act? We shall return to this problem later.

IV

14. Norman Ahmet gave evidence on behalf of the respondent concerning the selection of occasional teachers and the responsibilities of principals and vice-principals vis-a-vis contract teachers. Mr. Ahmet is currently assistant superintendent of student services. He has worked for the respondent for 20 years and has held positions as a classroom teacher, department head, vice-principal, principal, and supervisory officer. Mr. Ahmet's evidence was not seriously challenged and we have no hesitation in accepting it.

15. Mr. Ahmet testified that there was no established list from which occasional teachers are selected. The respondent does circulate a list of persons who have applied directly to its personnel office; however, the department heads in each school apparently maintain their own list of persons known to them to have the qualifications to teach their particular subject should a regular teacher be absent. When a history teacher calls in sick, or is expected to be absent, the department head in the history department will choose someone to fill in. The absent teacher may also suggest a replacement. Thus, short-term occasionals are not typically selected by the principal or vice-principal – although they may take part in the decision as to whether a class should be cancelled or assignments juggled so that it will be unnecessary to call in a supply teacher. Mr. Ahmet testified that if a regular teacher was to be away three to four weeks, the principal would usually ask the department head if he knew anyone available, and only if the response was negative would it be necessary to take out advertisements or conduct a search. There is no evidence that this has ever been necessary. On the other hand, in the case of long-term occasionals (a term which no one sought to define), there would ordinarily

be a selection committee, consisting of the principal, vice-principal and department head, which would interview prospective candidates. In relative terms, there are not very many of these long-term occasionals.

16. There is no evidence that the principals or vice-principals have any input or influence over the terms and conditions of employment for occasional teachers. They may sporadically participate in the selection process, but they do not prescribe the wage or benefit levels for occasional teachers. These matters are determined by the respondent.

17. Mr. Ahmet testified that in the 1983-84 school year, the respondent introduced a new policy of evaluating the performance of occasional teachers. But the evidence is that this policy has not actually been implemented nor was it established that the principals or vice-principals play a key role in the evaluation process. Mr. Ahmet said that, as far as he knows, there are no written evaluations of any of the some 200 occasional teachers who worked for the respondent in 1983-84, even though under the new policy it was supposedly the responsibility of the personnel office to maintain such information, on the advice of the school principal, so that there could be a direction not to call unsatisfactory employees or not to send particular teachers to a particular school. The intention was that the individuals themselves would also be notified, but again, there is no evidence that this has actually happened. In cross-examination, Mr. Ahmet indicated that it was the *department head* who was supposed to inform the principal of inadequate performance. This suggests that it is the department head who plays the critical role in this matter. The principal would be merely a conduit of information to the personnel office – which is only to be expected when it is the department head who initially decides who will be selected to fill any available vacancy. And, as things now stand, the critical job interest of most of the occasionals is whether or not they will be selected for work.

18. Before reviewing Mr. Ahmet's evidence concerning the duties of principals and vice-principals, it may be useful to set out the statutory description of their responsibilities found in section 236 of the *Education Act* and sections 12 and 13 of Regulation 262 under that Act. They provide:

Education Act

236. It is the duty of a principal of a school, in addition to his duties as a teacher,

- (a) to maintain proper order and discipline in the school;
- (b) to develop co-operation and co-ordination of effort among the members of the staff of the school;
- • •
- (e) to prepare a timetable, to conduct the school according to such timetable and the school year calendar or calendars applicable thereto, to make the calendar or calendars and the timetable accessible to the pupils, teachers and supervisory officers and to assign classes and subjects to the teachers.

Regulation 262

12(3) In addition to the duties under the Act and those assigned by the board, the principal of a school shall,

- (a) supervise the instruction in the school and advise and assist any teacher, in co-operation with the teacher in charge of the organizational unit or program in which the teacher teaches;
- (b) assign duties to vice-principals and to teachers in charge of organizational units or programs;
- (c) report to the board or to the supervisory officer in writing, on request, on the effectiveness of members of the teaching staff and give to a teacher referred to in any such report a copy of the portion of the report that refers to the teacher;
- (f) recommend to the board,
 - (i) the appointment and promotion of teachers, and
 - (ii) the demotion or dismissal of a teacher whose work or attitude is unsatisfactory, but only after warning the teacher in writing, giving the teacher assistance and allowing the teacher a reasonable time to improve;

13(1) A board may appoint one or more vice-principals for a school.

(2) A vice-principal shall perform such duties as are assigned to the vice-principal by the principal.

(3) In the absence of the principal of a school, a vice-principal, where a vice-principal has been appointed for the school, shall be in charge of the school and shall perform the duties of the principal.

19. The local school principal, as the legislation suggests, is both the principal teacher in the school, and the base of the respondent's administrative hierarchy. Above principals, there are eight academic supervisory officers covering elementary and secondary schools, a superintendent of personnel, a director of education, and ultimately a board of trustees. Within the school itself those involved in administration include the principal, vice-principal, department heads and, depending upon the size of the school, various assistants or specialists occupying positions of responsibility. Mr. Ahmet estimated that there were approximately 500 contract teachers on staff (i.e. individuals holding a permanent or probationary teacher's contract).

20. The evidence establishes that the principal has no independent authority to hire, fire or discipline contract teachers, although, as the person with the most immediate knowledge and responsibility for the workings of the school, the principal's opinions or recommendations will obviously be accorded considerable weight. However, given the legislative framework, professional context and collegial mode of decision-making, it is a little difficult to assess the precise independent significance of the principal's role. As one might expect, the relationship between highly trained professionals is not the same as that of superiors and subordinates in an industrial plant. In a professional milieu, problem-solving, peer review, counselling, and professional development, replace the more overt exercise of authority found in more traditional employer-employee relationships.

21. When it is necessary to hire probationary or permanent contract teachers, the board takes out advertisements, the principal conducts an interview, and a recommendation is made to the board of trustees. That recommendation is generally accepted. However, the interview and selection process will typically include not only the local principal, but also the vice-principal, the department head in the subject area, and perhaps a supervisory officer as well. The recommendation forwarded to the board reflects the consensus of the group. The selection committee for a new department head will usually consist of the principal, the vice-principal,

a department head in the subject area, and a supervisory officer. In the event that a new vice-principal is needed, the position is advertised in the local schools and the decision is made by a selection committee consisting of four board trustees, four supervisory officers, and the principal's representative. The selection committee will have before it the principal's evaluation of the candidate(s) and again makes a consensus recommendation to the board.

22. All probationary teachers (i.e., teachers employed on a probationary basis for up to two years) are evaluated at least three times a year by the principal or vice-principal. Permanent teachers are evaluated at least once every three years. In determining whether a probationary teacher should be accorded permanent status, the principal's evaluation is decisive. The principal will also be involved in a red flag situation where a teacher is exhibiting personal or performance problems. In theory, if such problems are not resolved a teacher could be terminated; but in practice, that does not happen. Mr. Ahmet testified that he could not recall any disciplinary discharge of a contract teacher in the secondary panel. Minor problems such as tardiness are ironed out by the principal, vice-principal, or department head in the collegial and consultative manner to which we have already referred. Mr. Ahmet was unaware of any discipline grievance in the past year and, in fact, there is no evidence of anything which would be considered disciplinary in a standard industrial relations sense. Mr. Ahmet expressed the opinion that if, for example, a teacher were charged with a serious sexual offence, the respondent's response would be formulated by the director of education and supervisory officer with the involvement of the principal.

23. The principals, vice-principals, and department heads are all covered by the current collective agreement between OSSTF and the respondent. They are part of the bargaining unit. The agreement recognizes a number of positions involving administrative functions, as well as the way in which the principal's decisions can impinge upon the teaching staff.

24. The principal is ultimately responsible for the timetable and thus the work load and work assignments – although he will obviously work closely with the vice-principal and department heads in order to ensure the best utilization of available resources. Where a teacher has a complaint about an excessive work load, there is an elaborate procedure of consultation with the department head, principal, and/or other relevant persons, including the appropriate supervisory officers of the Board regarding the stated problem. When supervisory officers of the board are involved, a representative of the Branch Affiliate will be present if the teacher so requests. The department head, principal or other officer must, in the course of consultation, make available to a school work load representative all relevant information used in timetabling (see Article 4.10 of the current collective agreement). If the department head, principal and/or the supervisory officers involved come to the conclusion that the excessive work load is not the result of legitimate timetable considerations, course option factors, or reasons related to the aggrieved teacher's area of specialization, they must take steps to rectify the problem.

25. There are other provisions of the collective agreement which illustrate the ambivalent role of the principal. Article 2.1.5.1.0 of the collective agreement contemplates that reports from the principal and/or supervisory officer may indicate that a teacher's performance is less than satisfactory and may lead to the withholding of an annual salary increment – subject to a fairly elaborate formula for examining and contesting that assessment. The agreement specifically recognizes that if a teacher's performance is inadequate and his increment withheld for more than two successive years, his employment may be terminated. Again, there is no evidence that this has happened.

26. The grievance procedure available to individuals alleging a breach of the collective agreement includes principals, and also indicates their ambivalent role. At step 1, a teacher who has a grievance must notify his principal of the grievance, *but they can discuss the grievance only if both parties agree*. This discussion may well result in a resolution of the problem, but if it does not, the issue proceeds to the director of education for his consideration. What is interesting is that the involvement of the principal depends upon the wishes of the grieving teacher, his professional colleague. A grieving principal notifies the supervisory officer.

27. Counsel for the respondent drew our attention to a number of other provisions of the collective agreement but, by and large, we do not regard them as particularly significant. For example, it appears that teacher redundancy or the phasing out of redundant positions of responsibility turns largely on enrolment figures or course choices rather than any judgment of the teacher's professional abilities which might call into play a potential conflict of interest between the employer and its employees. And, as we have already mentioned and will refer to again, these potential collective bargaining frictions have not been considered by the Legislature to be sufficient to justify the exclusion of principals from the ambit of collective bargaining.

V

28. What is interesting about this evidence is the absence of a clear line between superiors and subordinates – management and labour – of the kind which one might expect to find in a more traditional industrial setting. Here, it is very difficult to determine precisely how much independent influence the principal or vice-principal actually has. Insofar as contract teachers are concerned, the evidence reveals little of the industrial relations conflict which section 1(3)(b) was designed to avoid (see *Corporation of the District of Burnaby* [1974] 1 Can. LRB at p.3; and *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199). But perhaps that is not so surprising. In this professional context, the members of the OSSTF bargaining unit are all highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment, and requiring little external direction in the performance of their regular duties. Such direction as is necessary can be generated internally through group discussion, evaluation by peers, or collegial modes of decision-making, and one would not expect the managerial structure appropriate for professionals to be the same as that for manual workers. Professional employees will have a special relationship with their employer and with their fellow professionals.

29. The evidence establishes that the principals and vice-principals do not exercise much direction or control over the occasional teachers – not because they do not have the ultimate authority to do so, but rather because the occasion does not arise. Arranging for the employment and supervision of occasional teachers is a minor aspect of the principals' (or vice-principals') role and, on the evidence, the critical decisions for most occasionals are made by the department heads. For the most part, it is the department heads who determine who will be called and it is the department heads who make a professional assessment about the abilities of particular occasional teachers. The exercise of such authority, however, is so attenuated, sporadic and diffused that it is not very much different from the kind of authority exercised in an industrial context by senior or regular employees who may be called upon to express an opinion on the abilities of students, probationary employees or temporary employees with whom they work from time to time. Such recommendations are likely to be given considerable weight with respect to these casual employees, not because those expressing them

have managerial authority, but because the recall of one casual as opposed to another does not matter very much, so long as they display a minimum level of competence. The persons with whom they work directly are in the best position to express an informed opinion.

30. Peer review or evaluation is not uncommon in a professional setting, and is not, in itself, a managerial function within the meaning of section 1(3)(b). In a hospital context, a registered nurse might be called upon (and under an obligation) to express an opinion on the professional judgment or competence of a fellow nurse (full-time or casual), or an RNA. The expression of such opinions would not remove her from the bargaining unit or raise questions about the status of the Ontario Nurses' Association (see: *Ottawa General Hospital, supra*, and *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84). In a university setting, appraisal by professional peers is institutionalized, and it is not at all unusual for tenure committees composed of various members of the academic staff to determine or recommend whether other academics will be promoted or given tenure, or for a committee of professors to interview prospective colleagues and make an effective recommendation as to which of several candidates should be hired. This is not to deny that professional employees may also exercise managerial functions within the meaning of section 1(3)(b). It is simply that there must be a careful appraisal of the professional context. The adversarial model, conflict of interest rationale, and two-sides approach to collective bargaining is not easily applied to a group of professionals – as the Legislature undoubtedly recognized when it determined that principals and vice-principals should be included in the same bargaining units as their fellow teachers.

31. For these reasons, we have had some difficulty deciding how section 1(3)(b) would be applied to the relationship between principals and contract teachers if they were covered by the *Labour Relations Act*, and how it should be applied to the relationship with occasional teachers who are covered by the Act. It has been difficult to pinpoint just where managerial authority resides. The respondent argued that it was vested in law and practice in the principal. The evidence suggests that, insofar as occasionals are concerned, supervisory or managerial authority is vested primarily in the department heads. Clearly, there must be *someone* managing the occasionals in the sense contemplated by section 1(3)(b), and equally clearly that *someone* will be a member of OSSTF. Without being too specific about where effective control resides, or distinguishing the situation of long-term and short-term occasionals, it is evident to us that there are members of OSSTF who exercise managerial functions within the meaning of section 1(3)(b) vis-a-vis the occasional teachers. It remains to be determined whether this means that OSSTF is not a trade union and cannot be certified to represent occasional teachers.

VI

32. In order to appreciate the thrust of the parties' arguments, it is necessary to set out certain provisions of the *Labour Relations Act*. They are as follows:

1.-(1) In this Act,

• • •

- (p) trade union means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

• • •

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

- (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or
- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or
- (b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

105. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

33. The position of the respondent and the intervener can be quite simply stated. They argue that under section 1(1)(p), a trade union is an organization composed *exclusively* of employees or of *employees only*. A trade union cannot be an organization of employees *and others*; and, in particular, a union cannot include among its membership persons who are not employees under the Act, and could not be considered employees because of section 1(3)(b). Of course, strictly speaking, section 1(3)(b) cannot have any application because all contract teachers, including principals, vice-principals and department heads are excluded from the Act because of section 2(f). However, the respondent and intervener argue that principals and vice-principals and department heads, individually or collectively, have effective managerial authority over the occasional teachers, of a kind and character which would fall within the ambit of section 1(3)(b) if it applied to them. It is argued that because they are also members of OSSTF, OSSTF cannot be considered to be a trade union. It follows that OSSTF is not

entitled to represent occasional teachers and that occasional teachers are precluded from selecting OSSTF as their bargaining agent. We were referred to the following Board decisions: *Hydro Electric Power Commission of Ontario*, [1971] OLRB Rep. Aug. 501, *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 87, *Chrysler Canada Limited*, [1975] OLRB Rep. Nov. 852, *Armour Associates Ltd.*, [1976] OLRB Rep. March 117, *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651, and *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. Particular reliance is placed on the *HEPCO* case, *supra*, which held that an organization which included among its members persons who exercised managerial responsibilities, was not a trade union within the meaning of the Act, because a trade union must be composed *exclusively* of employees.

34. In reply, OSSTF points out that all of the decisions relied upon by the respondent and intervener are clearly distinguishable on the basis that none of the associations dealt with in those cases had, as OSSTF does, a far-reaching and independent base comprising thousands of members, and an established independent collective bargaining role under another statute. OSSTF cannot possibly be considered a weak, dependent, or company-dominated organization, controlled by agents as management, nor can the respondent plausibly make that claim. That is the mischief which concerned the Board in *HEPCO* and the other cases mentioned above, but it is not present here. Indeed, it is OSSTF's forthright and effective advocacy on behalf of teachers' interests which may make it attractive to the occasional teachers.

35. In OSSTF's submission, the purported conflict of interest referred to by the respondent and the intervener is a red herring which, in practice, is unlikely to occur, and which has not interfered with orderly collective bargaining in the education sector where principals and vice-principals are, by statute, included in the bargaining unit with contract teachers. The Legislature considered whether the exercise of administrative or supervisory functions prevented principals and vice-principals from being included in a bargaining unit along with their professional peers and decided that it did not. OSSTF urges the Board to consider this particular professional context and legislative choice, and not to second-guess the decision of the Legislature. OSSTF also notes that no occasional teacher has raised any concern about the composition of its membership. Only the respondent and intervener have done so. OSSTF asks rhetorically: why should occasional teachers be deprived of the right to choose OSSTF because of the respondent's allegations of conflict of interest? Even from the respondent's perspective, there is no reason to believe that principals, vice-principals and department heads will not be able to continue to fulfill their responsibilities to the respondent just as principals and vice-principals currently do with respect to contract teachers. The alleged managerial role does not impede collective bargaining under Bill 100, and, if anything, it is more marked in respect of contract teachers than occasionals. OSSTF asserts that the respondent and intervener are attempting to import as critical criteria in this jurisdiction, factors which both the Legislature and the Matthews Commission have rejected. If principals and vice-principals can be in the same bargaining unit as contract teachers under Bill 100, without creating a collective bargaining anomaly, then occasional teachers can be represented by OSSTF, if that is their wish. The statutory scheme under the *Labour Relations Act* is flexible enough to accommodate any difficulties without finding that OSSTF is not a union.

36. OSSTF further argues that the Board has no jurisdiction to read the word *exclusively* or *employees only* into the definition of a trade union found in section 1(1)(p) of the Act. The Board cannot add a qualification which does not appear on the words of the statute itself (see: *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972]

2 O.R. 498), and there is no need to do so here where the membership of OSSTF, including any arguable anomalies, has been prescribed by law. The so-called managerial personnel are members of OSSTF because the Legislature has prescribed that they must be. Moreover, the fact that OSSTF, or any other union for that matter, may have among its members persons not covered by the *Labour Relations Act* is inevitable, given the fragmented legislative jurisdiction over labour relations. OPSEU also includes thousands of employees who are not covered by the *Labour Relations Act*, but that does not mean it is not a trade union when it seeks to organize employees who *are covered by the Labour Relations Act*. Because the *Canada Labour Code* applies to supervisors, any union operating in the federal jurisdiction will quite likely have among its members persons whom the Board would consider managerial. Again, that does not mean that a union operating in the federal jurisdiction cannot be a trade union under the *Labour Relations Act*. A union might not be able to represent such persons under the *Labour Relations Act*, however, that does not mean that they could not be taken into membership. A union does not cease to be a union if it offers membership to persons to whom the *Labour Relations Act* has no application – such as a lawyer, architect, agricultural employee, crown employee or teacher. There is a distinction between the right to join or be a member of a trade union, and the right to have that union represent you for collective bargaining purposes. A teacher could join OPSEU without affecting its union status even though OPSEU could not represent that teacher in collective bargaining.

37. In OSSTF's submission, it is an organization of employees in fact. Teachers are employees. So are principals, vice-principals and department heads. OSSTF does not cease to be a union because its membership may include some persons who might not be considered employees under the *Labour Relations Act* if that statute were applied to them. It is artificial to apply a section 1(3)(b) standard to persons to whom it does not apply at all, yet ignore the statute and experience which does govern the collective bargaining relationship of most teachers in Ontario and suggests that there is no collective bargaining anomaly if teachers higher in the administrative hierarchy are included in the same bargaining unit as those further down. Insofar as the *Labour Relations Act* does apply to members of OSSTF, there are no such members who exercise managerial functions.

38. Counsel for OSSTF notes that section 3 of the *Labour Relations Act* contemplates that any *person* is entitled to join a trade union and participate in its lawful activities. This, in itself, suggests that membership can be extended to non-employees. If it were otherwise, and if the Board were to apply a strict and literal meaning, the word employees in section 1(1)(p), a union would cease to be a union if any non-employee (retirees, spouses of members, the unemployed, etc.) were admitted to membership. Unions are not restricted by law to collective bargaining activities, however, if the respondent and intervener are right, any enrolment of non-employee members to pursue other endeavours (a co-operative housing project for example) could prejudice the union's status under the *Labour Relations Act*. But if unions, by law, are not restricted to collective bargaining endeavours, why should collective bargaining considerations be the sole determinant of who can be a union member?

39. OSSTF points out that many craft unions, particularly in the construction industry, count among their members person who have left bargaining units to become foremen, superintendents, and even the proprietors of small businesses. They retain their trade union membership for a number of reasons, the most pragmatic of which is the recognition that the vagaries of the market might well compel a change in their fortunes and a return to employment for which trade union membership is an advantage or prerequisite. They may also

want to maintain their entitlement to union pension or welfare funds to which they may have contributed. Whatever the reason, these trade unions do have such persons among their members, and no one would seriously suggest that because of that they fail to meet the statutory definition of trade union. The Board held otherwise in an unreported case involving the Hamilton Construction Association and Builders Exchange, and that view was sustained by the Court in *Hamilton Construction Association and Builders Exchange v. OLRB* [1963] 2 O.R. 393. There, it was found that Local 18 of the United Brotherhood of Carpenters and Joiners of America included among its membership certain superintendents and non-working foremen who exercised managerial functions in the sense intended by section 1(3)(b) of the Act, but neither the Board nor the Court was persuaded that Local 18 was not a trade union within the meaning of the Act.

40. Finally, OSSTF asserts that in light of the *Charter of Rights* guarantee of freedom of association, the Board should be loath to restrict the group with whom the occasional teachers (should they so wish) can associate for collective bargaining purposes. OSSTF argues that no such restriction is warranted unless there are compelling reasons of industrial relations policy. No such reasons are apparent here. If anything, the existing framework for teacher collective bargaining suggests that in this context, the potential for conflict between one teaching professional and another has not been regarded by the Legislature as having overriding collective bargaining significance. OSSTF asserts that section 3 should be given a liberal interpretation and any questions concerning the quality of representation or the union's independence are addressed elsewhere in the Act.

41. If these arguments have a certain familiar ring, it is because they are substantially the same as those made by the respondent and OSSTF in the *Humewood House* case, *supra*. There, as here, the respondent Board of Education argued that OSSTF was not a trade union within the meaning of the *Labour Relations Act*. The Board disagreed. Its conclusion can be found at paragraphs 56-61 of the decision:

56. The *HEPCO* case held that the phrase organization of employees must be read as organization of employees only, having regard to the precision with which the meaning of the word employee is limited by paragraph 1(3)(b) of the Act. That reading of the language of paragraph 1(1)(p) would exclude from trade union membership not only managerial persons, who would be considered employees but for the deeming provision of paragraph 1(3)(b), but also persons who are not in any sense of the word anyone's employee. If that were the intention of the Legislature, then why it did it so carefully use the person in section 3 when describing those who may join and participate in trade unions? The use of that word must at very least contemplate trade unions having members who are not employees because they are unemployed: see *Ottawa General Hospital, supra*, at paragraphs 24 and 26. While the language of section 3 of the Act does not create for managerial persons a protected right to join and participate in the activities of a trade union, that language is clearly inconsistent with an interpretation of section 1(1)(p) which requires that the phrase organization of employees be read as organization of employees only. It is noteworthy that none of the decisions which favour the employee only interpretation of section 1(1)(p) makes any reference to section 3 of the Act.

57. The *HEPCO* employee only interpretation of paragraph 1(1)(p) not only fails to take the language of section 3 into account, it also comes into conflict with characteristics of organizations commonly thought of as trade unions. We have already observed that craft unions tend to have managerial members, and that an employees only definition would prevent the unemployed from joining trade unions. It must also be recognized that trade unions are often employers themselves; indeed, trade union employees can be and have been the subject of certification applications. In defining a bargaining unit of trade union employees, paragraph

1(3)(b) comes into play and those who act on the union's behalf in hiring, firing and directing the work of its employed staff will be excluded as managerial. If paragraph 1(1)(p) means what *HEPCO* says it does, then either those managerial persons would have to give up their union membership, or the trade union would have to give up its managers or its employees or forfeit its status. This is an absurd result.

58. It is important to note also that the *Labour Relations Act* expressly defines trade union to include provincial, national and international trade unions. Many such organizations exist. Some existed, as OSSTF did, before the Ontario legislature enacted any collective bargaining legislation; those organizations are not disqualified as trade unions by the fact that their founders were not persons then covered by such legislation. A trade union may function in a number of jurisdictions and under a range of collective bargaining statutes. It is not disqualified as a trade union in Ontario by the fact that its members in those other jurisdictions and under those other statutes are not persons covered by the Ontario *Labour Relations Act*. It can be expected that the legislature in each such other jurisdiction will have recognized that collective bargaining requires an arms-length [sic] relationship between employees on the one hand and their employer on the other, and that in the interest of both sides it is necessary to put managerial employees on the employer's side of the table in shaping any particular collective bargaining relationship. It may be supposed, therefore, that each jurisdiction and each collective bargaining statute will draw that managerial line or assign the task of line drawing to a tribunal empowered to administer the statute. While the principle of separation of employer and employee interests may be clear, the result of its application may vary from jurisdiction to jurisdiction, from statute to statute and from tribunal to tribunal. A legislature may feel that the various interests involved in collective bargaining generally, or in certain employment sectors in particular, are better served by drawing the managerial line at a point different from that at which this Board might have drawn the line in the same circumstances. It would seem peculiar and, frankly, pretentious if we were to deny an international, national or provincial trade union the opportunity to represent Ontario employees merely because some legislative body or administrative tribunal has required it to represent persons whom we would not, by reason of their duties, have included in a bargaining unit established under the *Labour Relations Act*. It is one thing to be ever vigilant against the mischief of company dominated unions. It is quite another to insist that those organizations which appear before this Board as trade unions conduct themselves in accordance with our views of membership purity regardless of the consequences to their ability to function in other jurisdictions. When public sector unions (OPSEU, for example) come before this Board for certification under the *Labour Relations Act*, we do not require of them proof that in their representation of employees under other statutes they have not undertaken the representation of, or accepted as members, persons whose job functions might appear to us to be managerial.

59. We conclude that the phrase organization of employees in paragraph 1(1)(p) of the Act does not mean organization of employees only. The mere fact that an organization has in its membership persons whose employment requires them to exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act will not stand in the way of a finding that the organization is a trade union within the meaning of paragraph 1(1)(p) of the Act, if it otherwise qualifies to be so described. We respectfully decline to follow those earlier decisions which held otherwise. We acknowledge and share the concern those earlier decisions expressed about the potential for conflict of interest which can appear when managerial employees are members of trade unions. The need to keep employers and bargaining agents at arm's length is fundamental to the scheme of the *Labour Relations Act*, but the right of employees on a majoritarian basis to freely choose their bargaining agent is equally fundamental. As a result, it is not for the Board to withhold rights from a freely selected trade union on grounds other than those contemplated by the Act. Sections 13 and 48 speak to actual employer participation and support. A speculative concern about an organization's vulnerability to employer domination no more justifies denial of representation rights than would a concern that the composition of a trade union's general membership, or of another bargaining unit it represents, might divert it from the single-minded pursuit of the interests of the employees in the particular bargaining unit it seeks to represent (see *H. Gray Limited*, 55 CLLC 18,011, and *Canadian Iron Foundries*, 56 CLLC 18,027). The *Labour Relations Act* provides safeguards against the

realization of any potential for conflict of interest. By virtue of section 68 of the Act, a trade union which acquires the right to represent the employees in a bargaining unit assumes a duty to act fairly toward those employees in exercising that right, and that will require that the trade union avoid conflicts with the interests of persons excluded from that unit. While managerial membership alone will not trigger sections 13 and 48, the potential application of those sections to the trade union and, consequently, of section 64 to some one or more employers, will throw a spotlight on the reasons for such membership, and on the nature and degree of such members' participation in the affairs of the trade union. In the ordinary case, one would wonder why a person would join an organization devoted to collective bargaining in which it cannot represent him. When he is actively involved in those collective bargaining activities, one's wonder would grow at tolerance by his employer and by the trade union of any apparent conflict of interest, especially when the managerial employee had no protected right to join the trade union or participate in its activities. While it will be a question of fact in each case whether managerial members are acting on behalf of employers, there will be some cases where the absence of any explanation for the managerial employees' membership and active participation in a trade union may support an inference of employer domination. There will be few cases where, as here, the employees' allegedly managerial duties and concurrent trade union membership can be explained by the fact that *both* are compelled by law. Thus, sections 13, 48 and 68 encourage trade unions to confine the influence of managerial members; section 64 provides a similar incentive to employers. These provisions, together with the bargaining unit's ultimate remedy of changing or terminating its bargaining agent, are the safeguards the legislature has decided to provide for conflicts of interest in a system of free collective bargaining in which the concern for viable and independent bargaining representatives must share attention with the concern for the freedom to choose bargaining representatives on a majoritarian basis.

60. Before leaving this topic, we observe that the characterization of principals' duties for collective bargaining purposes has been the focus of attention on more than one occasion. The Reville committee considered whether or not principals should be excluded from bargaining units under teacher/school board collective bargaining legislation. The question was a difficult and controversial one. There were strong opinions on both sides of the question; the committee members could not agree on an answer. One member felt principals should be and were managerial, and should be excluded from any bargaining unit. The majority accepted that principals were teachers first and foremost and should be able to join with teachers in collective bargaining with boards, but felt they should have the option of forming their own bargaining units if they wished. The legislature ultimately included principals and vice-principals in the teachers' bargaining unit. It cannot be assumed, in the circumstances or at all, that in taking that approach the legislature was oblivious to this important and difficult question and the debate it had engendered. On the contrary, it should be assumed that the provisions of Bill 100 represent the legislature's conscious assessment that the duties and responsibilities of principals are not so managerial as to require their exclusion from a bargaining unit of contract teachers represented in bargaining by branch affiliates within the meaning assigned to that term by the legislation. Indeed, the same legislature which enacted paragraphs 1(1)(p) and 1(3)(b) of the *Labour Relations Act* also enacted Bill 100, assigned a collective bargaining role to branch affiliates of OSSTF, decided that principals fell on the employee side of the managerial line, and directed OSSTF's branch affiliates to represent units of contract teachers, including principals. This suggests that the legislature considered OSSTF to be an organization of employees formed for purposes that include the regulation of relations between employees and employers, and reinforces our conclusion that OSSTF fits within the definition of trade union under the *Labour Relations Act* even assuming, without deciding, that from the perspective of the *Labour Relations Act* principals might be regarded as exercising managerial functions. This does not mean that the character of principals' duties can never be a relevant consideration in an application before this Board. The fact that the legislature included principals in a bargaining unit of contract teachers established for the purpose of Bill 100 is not determinative of any issue whether persons exercising similar duties in relation to employees covered by the *Labour Relations Act* should be included in or excluded from bargaining units of such employees established for the purposes of that Act.

61. As we noted earlier, the Board found OSSTF to be a trade union in *Board of Education for the Borough of Scarborough*, *supra*, where that question had been put squarely in issue.

By virtue of section 105 of the *Labour Relations Act*, that earlier finding constitutes *prima facie* evidence of that fact in these proceedings, and that *prima facie* evidence has not been rebutted. Accordingly, we find that the applicant is a trade union.

42. We do not think any useful purpose would be served by reviewing the details of the Board's reasoning in the *Humewood House* decision. That reasoning comprises some thirty-five singled spaced pages, including a thorough review of all of the cases upon which the respondent there relied. The respondent and OPSEU rely on the same decisions in this case. We are not convinced that in this case we should depart from the views and approach found in paragraphs 38 to 61 of the *Humewood House* decision. However, in view of the nature of the issues raised, we think it appropriate to add a few additional comments of our own.

43. We may begin by reiterating the highly unusual context in which all of these questions arise, and the difficulty which this Board faces in applying the *Labour Relations Act* not only in a professional context but to a fragment of the education sector over which we generally have no jurisdiction, and for which the Legislature has created distinctive collective bargaining structures and rules. We do not think this background can be ignored, nor, apart from the *Humewood House* decision, is the established Board jurisprudence of much assistance. The circumstances are unique, and this, in itself, distinguishes the present case from all of the decisions upon which the respondent employer relies.

44. OSSTF is no weak and dependent organization, sponsored by the employer and subject to its influence. Its integrity and independence cannot really be questioned, nor can one give much weight to the respondent's suggestion that its own position could be compromised in its dealing with occasional teachers, if OSSTF were found to be a trade union and certified to represent them. Not only is there no evidence whatsoever that principals, vice-principals and department heads would deal with occasional teachers any differently than they are doing now, but such residual concern on the respondent's part, must be weighed against its own submission that principals and vice-principals exercise significant managerial functions under Bill 100 in respect of contract teachers, and are under a statutory obligation to do so. Yet there was no evidence of the kind of conflict of interest which section 1(3)(b) was designed to avoid. Even assuming that principals and vice-principals have certain administrative and managerial responsibilities, it is significant that the Legislature has decided that they all should be included in the same bargaining unit as other teachers. We do not minimize the importance of preserving the independence of the employees' bargaining agent, but in this unusual context, and from a purely policy point of view, we see no reason to lean towards an interpretation of the *Labour Relations Act* which would prevent occasional teachers from choosing OSSTF to represent them. If anything, the circumstances suggest that the Board should lean in the other direction.

45. We do not find the language of section 1(1)(p) as clear and compelling as the respondent and intervenor suggest. Despite the gloss given to the statutory language in the *HEPCO* decision, the fact is that the Act *does not* expressly require that a trade union be composed *exclusively* of employees or of *employees only*; and since a trade union is not confined to purely collective bargaining functions, one can easily envisage a variety of activities in which non-employee members might wish to engage: co-operative housing programmes, political activity, mutual insurance schemes, etc. Conversely, section 3 of the Act suggests that union membership should be open to *persons* – not *employees* – wishing to participate in these lawful activities. Even within the realm of the union's core functions – collective bargaining

– it is obvious that from time to time it will number among its members persons who are unemployed, and section 106(2) of the Act recognizes that a union may include among its members persons exercising managerial functions, because the definition of that term can often be subject to debate. Obviously such inclusion should not, in itself, prejudice the organization's status as a trade union.

46. While the respondent employer suggests that there may be serious consequences for employees and their unions if management persons are admitted into membership, there is no evidence that that has been the experience in the education sector, nor in the context of construction trade unions which often permit managers and even small employers to continue to carry their cards against the day that they might have to return to the tools. It would certainly be a surprise to the labour relations community if the Board were to hold that, because of this practice, all of these organizations are no longer trade unions. Yet that is what would flow from the interpretation the respondent and intervener urge upon us. It would also be a surprise to the union, such as the Communications Workers of Canada, which operates in the federal jurisdiction where supervisors are included in its bargaining unit and are eligible for membership. Nor can it be said that because a trade union's membership base is not covered by the Act, it cannot be a union within the meaning of the Act. If that were the case, OPSEU, the exclusive bargaining agent for Crown employees, could not represent employees in the private sector. The word employee in section 1(1)(p) cannot be restricted to employees covered and defined by the *Labour Relations Act* or unions like OPSEU or the Quebec-based CNTU, whose origins and membership are in other jurisdictions, could not seek to represent employees under the *Labour Relations Act*. We do not think OSSTF loses its right to claim status as a union, because, by law, it must include people who are not covered by the Act, and who may exercise managerial functions vis-a-vis employee-members who are covered by the Act. Any anomalies can be effectively contained by sections 13, 48, 64 and 68, rather than the interpretation of section 1(1)(p) urged upon us by the respondent and intervener.

47. Does this shift of focus from section 1(1)(p) to sections 13, 48, 64 and 68 represent any retreat from the Board's often-stated concern about company-dominated unions or the independence of the bargaining parties? We do not think so. In our view, those sections provide ample protection should members of OSSTF, *acting on behalf of the employer*, seek to influence the employees' choice as to whether they should join a trade union or which trade union to join. Of course, it will be a question to be determined in each case whether a member of OSSTF was not acting on its behalf but on behalf of the employer, because it cannot be assumed that even someone in a so-called managerial position will necessarily be acting in the employer's interest when he encourages other employees to join a union. A case in point is *Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. Feb. 130, application for judicial review dismissed, July 11, 1978 (unreported). There, the lame duck reeve actively solicited support for the union and both the Board and the Divisional Court concluded that the reeve was not acting on behalf of the employer, but actually against its interests. Of course, as the Board noted in the *Humewood House* decision, *supra*, the involvement of such persons in an organizing campaign would certainly raise a question which OSSTF or any other union would have to address, and the Board might well question the voluntariness of any membership evidence solicited by such individuals (see *Veres Wire Limited*, [1976] OLRB Rep. July 337) and might either discount such evidence or exercise its discretion to seek the confirmatory evidence of a representation vote. Under section 68 of the Act, any purported representation of occasional teachers by persons directly involved in their case or unable to faithfully play the role of independent advocate would trigger liability, just as it did in *Windsor Western*

Hospital, [1984] OLRB Rep. Nov. 1643. In that case it was held that the Ontario Nurses' Association breached its duty of fair representation when a union official who had rendered a professional judgment on the competence of a fellow nurse, purported to represent the union in a consequent disciplinary meeting with management. Section 68 presents a potent check on any inclination OSSTF may have to ignore the concerns of occasional teachers or sacrifice their interests to those of other OSSTF members – a possibility mentioned by the Matthews Commission in its report. We are not at this stage prepared to make the assumption that OSSTF or its members would do so.

48. For the foregoing reasons, we are satisfied that OSSTF is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. It is an organization of employees formed for purposes that include collective bargaining. There is no evidence before us to trigger section 13. We are satisfied, therefore, that the certification application can proceed. It remains to determine how one should apply the Act to the rather unique employment situation of occasional teachers.

VII

The Composition of the Voting Constituency and Bargaining Unit

49. As we have already noted, the Board's jurisdiction in respect of occasional teachers arises only because they have been excluded from collective bargaining under Bill 100, and, in consequence, we are left with the difficult question of how to determine the composition of a bargaining unit which will necessarily be composed almost exclusively of individuals with only a casual attachment to the respondent and an uncertain claim to the work opportunities which the respondent provides. The only individuals with an unequivocal claim to being employees in the bargaining unit at the time the application is made, are individuals actually at work on that date, even though, for the purpose of collective bargaining, they may be quite unrepresentative of the wishes of the occasional teachers who will be embraced by the collective bargaining process. In the construction industry, the Board regards those not actually at work on the application date only as prospective employees until they are actually hired; but we are not persuaded that the construction industry model is applicable in the present circumstances, nor did any of the parties urge us to adopt it. They all argued that it was necessary to develop a new test, to meet the special circumstances of the applications currently before the Board.

50. Outside the construction industry the Board ordinarily takes a more flexible approach to the composition of the bargaining unit, recognizing that there may well be individuals (on layoff, sick leave, maternity leave, etc.) who are not actually at work when a certification application is made, but who should nevertheless be treated as *employees in the bargaining unit* for labour relations purposes. It is that group to whom the Board looks when determining whether the applicant trade union has the level of support necessary for outright certification or entitlement to a representation vote (see section 7 of the Act). The Board endeavours to give the words employee in the bargaining unit a meaning which is sensible and workable and will appropriately accommodate the individual and collective bargaining interests at issue.

51. What are those interests? They can be simply stated. Employees seeking to organize themselves should be able, with some certainty, to identify the constituency of their fellow employees whom they must organize, and that will be used by the Board when assessing the

degree of membership support necessary for certification. On the other hand, there will always be some individuals who are not actually at work on the date the certification application is made, but who will still have a sufficiently substantial employment attachment to justify inclusion in the employee constituency and a voice in the selection of the bargaining agent even though they may not be actively employed in the bargaining unit when a certification application is made. In order to balance these concerns, the Board has developed what is now colloquially described as the 30/30-day rule or the 30/30 rule, which the Board applies for the purposes of determining whether individuals not actually at work on the *date* the application is made should, nevertheless, be treated as *employees in the bargaining unit at the time the application is made*. (See: *Amplifone Canada Limited*, [1967] OLRB Rep. Dec. 840.)

52. In order to meet the requirements of the 30/30-day rule, an employee not actually at work on the application date must have worked at some time in the 30-day period immediately preceding the application *and* work, or be expected to return to work at some time in the 30-day period immediately after the application date. Of course, like all rules, this one could be considered somewhat arbitrary; however, the fact is that it has withstood the test of time (at least 30 years), and without it or some similar arbitrary rule, it would be impossible to expeditiously process the hundreds of certification applications which come before the Board every year. The 30/30 rule has been regularly and routinely applied in a variety of industrial contexts to the obvious advantage of parties who must make or respond to certification applications. No rule is written in stone; but there is a substantial onus upon any party seeking to persuade the Board to depart from this well-established, useful, and well-accepted practice. That is what the respondent and OPSEU urge the Board to do in the instant case.

53. About two years ago, OPSEU filed the first application for certification involving a bargaining unit of occasional teachers employed, from time to time, by the Board of Education for the City of Toronto (see *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273). There, as here, there was some concern about the application of the 30/30 rule to the unusual employment context of occasional teachers. In the result, the Board decided not to depart from its established approach. The Board dealt with the arguments as follows:

24. Thus, to be included as an employee in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work (or have been expected to return to work) within the one month period following the application date. (See also *Brewers Nursing Home*, [1981] OLRB Rep. July 852; *Irwin Toy Limited*, [1970] OLRB Rep. Dec. 912; *Keynorth Limited*, [1970] OLRB Rep. July 477; *Mobile Cartage and Distributors Ltd.*, [1968] OLRB Rep. Nov. 814; and *West Elgin District High School Board*, [1968] OLRB Rep. July 379.) This longstanding practice of the Board enables the parties to ascertain in advance of the hearing the persons who will be included for purposes of the count (see *Sydenham District Hospital*, [1967] OLRB Rep. May 135). A further reason for the existence of the practice is that it tends to exclude from the count persons who have not been at work during the trade union's organizing campaign and have not had an opportunity to express their support for or opposition to the trade union (see *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292). See also *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 460. . . .

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27. Board practices such as the seven week rule (described in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. April 503), and the thirty day rule described above, are guidelines, not

hard and fast rules. However, since such guidelines are known, accepted and relied on by unions and employers alike, there is a substantial onus on any party requesting the Board to depart from such practices (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116, and *Sherman Sand and Gravel Ltd.*, *supra*). In the circumstances of the instant case, the Board does not find it appropriate to depart from its normal practice of applying the thirty day rule. Although the employment pattern for at least some of the respondent's occasional teachers is more sporadic than that of other persons employed by the respondent such as its contract teachers, we are nevertheless of the view that, in the context of the present case, the thirty day rule provides an appropriate balance between the legitimate interest of employees (not at work on the date of the application but nevertheless having a substantial employment nexus with the respondent) in having a voice in the selection or rejection of the applicant as bargaining agent, and the legitimate interest of the applicant and the other parties in knowing with a reasonable degree of certainty which persons will be included by the Board as employees for purposes of the count. The alternative approaches advocated by Mr. Brady and Mr. Edson would include as employees for purposes of the count a number of persons with little or no connection with the respondent's active work force of occasional teachers. Such persons would not have been identifiable by organizers seeking to contact bargaining unit employees in an effort to persuade them to join the applicant and support its certification. Similarly, they could not have been identified or contacted by objectors wishing to organize opposition to this application. Finally, it may be noted that any potential difficulty that might have arisen in applying the second branch of the thirty day rule in the context of this application has been eliminated by the fact that more than thirty days have now passed since the date of the application. Thus, the respondent is in a position to specify with complete precision the occasional teachers who were not at work on December 17, 1982, but who were at work at some time within 30 days thereafter.

54. Interestingly enough, *none*, of the parties in the instant case urged the Board to follow the approach in *The Board of Education for the City of Toronto* – even though OSSTF and OPSEU were both parties in that case, and OPSEU's position was ultimately accepted by the Board. Whether this change of mind results from a reconsideration of the issues involved, now that there are numerous other applications pending before the Board, or from a quest for tactical advantage in the instant case, we need not determine. The fact remains that, in this case, none of the parties were particularly happy with the results of applying the Board's usual 30/30 rule.

55. OSSTF argues that the Board should focus only on the front 30 days, and find that the number of employees in the bargaining unit on the application date includes only those who were actually at work on the application date, or were actively at work during the 30-day period immediately preceding the application date. OSSTF argues that a consideration of the second 30-day period (after the application date) would create insuperable obstacles for organizing occasional teachers. OSSTF argues that in a fluid situation, there can never be a system of perfect democracy. OSSTF asserts that its test would include all long-term occasionals as well as those actively working and indicating an interest in collective bargaining in the period immediately prior to the filing of the certification application. The interest of the numerous other occasionals is simply too remote. OSSTF argues that the Board should not adopt an approach which might inhibit the opportunity of occasional teachers to organize themselves and bargain collectively.

56. OSSTF also argues that, as an administrative matter, many certification applications, and most cases in which a pre-hearing vote is requested, will never have a second 30-day period, because the case simply comes on too quickly. In this respect, *The Board of Education for the City of Toronto* decision is distinguishable, because the Board expressly noted that any problems in applying the 30/30 rule were mitigated in that case because the second 30-days

had passed since the date of the application (see paragraph 27). Counsel for OSSTF also points out that under section 9, membership is determined as at the application date. He argues that a union cannot reasonably be expected to organize persons who have not yet been hired and whose identity cannot possibly be predicted. OSSTF argues that its rights should not be prejudiced by the inclusion in the bargaining unit of persons who are neither working in the unit on the application date or the previous month, and whose re-employment is speculative and unpredictable. OSSTF notes further that, if the Board's usual 30/30 rule is applied, it would be relatively easy for an employer to manipulate its hiring in the back 30 days so as to limit the number of employees whom the Board would consider part of the unit for the purposes of the membership count. All an employer would have to do would be to select other occasional teachers. It would be difficult to detect such manipulation and it is by no means clear whether there would be any effective remedy. In OSSTF's submission, all of these problems can be effectively resolved if the Board treats as employees in the bargaining unit (and voting constituency) only those who were actively employed on the application date or in the 30 days preceding the application date. It is these individuals who have the most immediate attachment to the work place, and it is their views which should be considered in determining whether OSSTF should be certified.

57. The respondent and OPSEU both urge the Board to take into account the special circumstances of this case, and they, like OSSTF, reject the application of the 30/30 rule. In their submission, the underlying rationale of the 30/30 rule simply has no application, and this is so whether one focuses upon the front or back 30 days. Here, there is no majority or core group of regular employees, with some fringe minority not at work on the date of application by reason of layoff, sick leave, etc. Apart from a few long-term occasionals, all of the individuals potentially affected by this application, and caught by whatever test one applies, will be more or less casual and will have a transitory presence in the schools. In this context, the 30/30 rule does not provide an appropriate test of attachment to the employer which, they suggest, is the significant question for collective bargaining purposes. To take two concrete examples: where is the logic in excluding teacher Bujic, who worked 38 days and Starkman, who worked 25 days, but including teachers Maude and Thompson, who worked only day in the entire year and Colaianni, who worked only two days – albeit on the application date or the immediately preceding 30 days? Likewise, John Pownall would be included for the purpose of the union's membership count and vote, even though he worked only three days in the 1983-84 school year, because one of those days, fortuitously, was the application date. Yet, teachers who worked many more days could be excluded if they did not meet the 30/30 rule, or the front 30 rule proposed by OSSTF.

58. The respondent and OPSEU concede that some rule is necessary for administrative purposes, and that the 30/30 rule may be appropriate in almost all cases. But it makes no sense here. It would unduly restrict the constituency of occasional teachers who have an obvious interest in this certification case. The respondent refers both to the statistics concerning the occasional teachers' employment pattern and the results of the representation vote.

59. It will be recalled that there were approximately 200 teachers who taught at least once during the 1983-84 school year. Some 81 teachers cast ballots in the representation vote, of whom 22 had never taught at all in the school year. A further 24 would be excluded if the Board applied the usual 30/30 rule to the voting constituency. Thus, the collective bargaining interests of 200 or more occasional teachers could be determined by the votes of 35 of them, of whom about a quarter had worked less than 20 days. By contrast, 141 teachers

who worked during the 1983-84 school year *did not* vote. On the Board's usual test only fifty-one of those would have been eligible, because they either worked on the application date or met the 30/30 rule. Of this 51, a dozen had worked less than ten days. Ninety occasional teachers, close to half of the total who worked, would be excluded if the 30/30 rule were applied. Even if one accepts the proposition that for a group of teachers whose employment is casual, one can determine employment attachment by the number of days worked, it is evident that the 30/30 rule will not effectively do so. Moreover, the respondent asserts that it is misleading to equate collective bargaining interest, employment attachment, and the number of days worked. All occasional teachers are occasional workers and the interest of an occasional teacher who works six days in a year are, on the evidence, not that much different from a teacher (the minority) who works more than 20 days.

60. The respondent also points out that, as a practical matter and despite the assumptions in such cases as *The Board of Education for the City of Toronto, supra*, and *Amplifone Canada Ltd., supra*, the organizational efforts of the applicant and intervener have not been focused on the local schools, and realistically could not be, because the overwhelming majority of occasional teachers do not have a regular employment relationship, let alone a regular work place. Consequently, OPSEU and OSSTF have both sought to recruit members through newspaper advertisements and other general appeals not centered on particular schools in which the occasionals work from time to time. To the extent that the 30/30 rule is based upon an organizing rationale, that rationale has no application here.

61. The respondent and OPSEU urge the Board to reject the 30/30 rule, the OSSTF position, and the narrower rule applied to casual workers in the construction industry, which would limit the scope of the bargaining unit to those employees actually at work and literally in it on the application date. In their submission, this latter, literal, and legalistic test, may be technically correct in the construction industry, and the 30/30 rule may be useful in other contexts, but here it would ignore the interests of a large number of occasional teachers who might not meet the rule, but who are clearly interested in the outcome of this application and may even have appeared to cast a ballot. The respondent and OPSEU asserted initially that the bargaining unit and voting constituency should consist of all occasional teachers who have worked at least one day in the school year (September to June) by the time the application was made. This was described as a test of proven availability, which would exclude those individuals on the call-in list who had never actually been called to work. Subsequently, counsel for OPSEU proposed a new theory which, he said, made more sense, given the sporadic nature of the occasionals' employment and the fact that if the application for certification were made early in the school year there would have been little occasion to call upon the services of any of the supply teachers on the list. In the early months of the school year, the test of proven ability originally enunciated would not yield a representative grouping of occasional teachers. Counsel for OPSEU proposed that there should be a two-fold test, depending upon when the application for certification was made. If the application was filed during the early part of the school year – September or October – the grouping for the purpose of determining the union's membership position, and any consequent representation vote, should include all those occasional teachers who had actually worked in that academic year, together with anyone currently on the list of persons actually interested in employment, who had worked during the preceding academic term (January to June). If the application were made later in the school year, the original test of proven availability could be applied: i.e., all those who had worked at least one day in that academic year prior to the application date. In both cases, for the purposes of any representation vote, the test for voter eligibility should

be whether the individual had worked at least one day in the academic year prior to the day on which the vote is directed – although, it might be necessary in some cases to delay the vote if the application were made at the beginning of the academic year. Counsel for the respondent did not quarrel with this approach except to suggest that November 15th would be a better cutoff date because by that time the respondent would have a better idea about precisely who was actively interested in working and had some likelihood of being employed.

VIII

62. We are called upon in this case to formulate an approach that makes collective bargaining and statutory sense in a situation which the parties themselves readily acknowledge cannot be determined by common law rules as to who is or is not an employee, and which does not fit the rationale for the 30/30 rule which the Board routinely applies in industrial situations. Since the vast majority of employees in the bargaining unit will have only a casual attachment to the respondent, we must determine whose views should be canvassed to determine whether the group as a whole will be entitled to engage in collective bargaining through the bargaining agent of their choice. We could adhere to the 30/30 rule, adopt one of the propositions urged upon us by the parties, or apply some other approach which accommodates the competing interests at issue. Any approach will necessarily be somewhat arbitrary and will entail some difficulties. However, even in this anomalous situation, we are persuaded that there must be a bright line test or the rights of occasional teachers in this and other applications will be lost in a sea of litigation. The parties recognize the need for a uniform and standard approach. That is why they agree that this should be a test case. They disagree as to what the rule should be.

63. Having considered the parties' representations, we are inclined to agree that the 30/30 rule is inappropriate in this context. In so doing, we have not ignored the contrary view expressed by the Board in *The Board of Education for the City of Toronto, supra*, nor have we ignored the important institutional value of uniformity of approach to similar problems. Parties can, and should, reasonably expect that if a decision has been rendered in an earlier proceeding which is logically related to a later one, the earlier decision will be taken into account. Consistency, objectivity, and predictability are important values. On the other hand, as Professor Laskin (as he then was) observed in *Re C.G.E.* (1959), 9 L.A.C. 342, the first look at a problem is not necessarily the correct look, nor is it always a desirable policy that it is better that a matter be settled, than that it be settled right. The decision of the Board in *The Board of Education for the City of Toronto* was a first preliminary look at a novel issue and employment situation; and it appears that the Board did not have before it the detailed evidence of the occasional teachers' employment profile which we have before us in this case. When one examines that evidence, it is clear that the effect of applying the 30/30 rule would be to exclude from the decision-making process a great many individuals whose claim to participate is as strong as many of those who would be included. Accordingly, we are not persuaded that we should apply the 30/30 rule in this application.

64. What is required in this case is a test for employment in the bargaining unit which is sensitive to both the objectives of the statute and the interests of the parties – a test which is simple, certain, easily applied, and which will ensure that a successful union really does represent the wishes of the individuals encompassed by the framework of collective bargaining. Those are difficult objectives to harmonize, given the essentially sporadic nature of the

occasional teachers' employment. In our view, the best way of doing so is to adopt a variant of the approach proposed by the respondent and the intervener.

65. There is something to be said for the proposition that, at some point during the school year, it may be possible to identify the core group of occasional teachers who will have a proven attachment to a particular school or board of education. But we are not disposed to engage in an arithmetic or statistical exercise. The situation is complicated enough already without considering, on a case-by-case basis, the precise point when the utilization of particular occasionals will be sufficiently frequent to generate a coherent and identifiable group. Given the essentially casual attachment of almost all of the occasionals, we are persuaded that the bargaining unit of occasional teachers should be defined in more general terms. It should include all occasional teachers actively at work on the application date, as well as all those on the list of individuals actively interested in employment who have worked at least one day in the twelve-month period preceding the application date. This test will necessarily overlap at least two academic terms and will avoid any problems associated with a certification application made early in a particular school year. It is obviously broader than the approach normally adopted by the Board, but, in our view, it is appropriate where the Board is called upon to determine an appropriate bargaining unit of what must necessarily be casual employees. We might note that this approach is not entirely unprecedented and may even be somewhat narrower than that adopted in other jurisdictions. In a case involving the *Eugene (Oregon) School District*, reported at 97 L.R.R.M. 2625, the United States National Labour Relations Board defined a bargaining unit composed entirely of substitute teachers, but included on the employee list all substitute teachers who were registered in that academic year. The proposal or test we adopt incorporates the respondent's proposition that one should have regard to proven availability as evidenced by actual work experience, and the intervener's observation that this test might not work very well if an application is made early in the school year.

66. The same rule would be applied in the case of a representation vote, except that the temporal reference point will be the date the vote is ordered. We recognize that in an ordinary certification application this may mean that the constituency for the vote may be a little different than the constituency for the count, because between the time the application is made and the time the vote is directed a few new occasionals may be called. But this is always the case, and, in our view, any union concern is adequately met by the rules respecting the mechanics of the vote which we have set out below. This variant of the respondent's test of proven availability may pose some additional burdens upon a union seeking to organize occasional teachers, however, we do not think such burden is unduly onerous; and the broader approach ensures that the decision to certify will be based upon the wishes of a wider segment of the individuals whom the union will be required to represent. As a purely practical matter, we do not see how effective collective bargaining could take place in circumstances where the union's certification was based upon the views of a small minority. Needless to say, this special approach has been adopted to meet the unusual circumstances of occasional teachers, and should not be construed as a signal that the Board will depart from its established practice in other contexts.

IX

The Mechanics of the Representation Vote

67. If the 30/30 rule does not yield a sensible collective bargaining result in the circumstances of this case, neither does the Board's usual approach to the conduct of

representation votes, which is based upon the assumption that the best place to conduct the ballot is at the employees' work place. The problem is highlighted by the voter turnout in this particular case. Only about a third of the occasional teachers arguably eligible to vote chose to cast ballots and a quarter of those had never actually worked for the respondent during the 1983-84 school year. The result is that the votes of a small number of occasional teachers could determine whether a particular applicant would be certified, even though that number of supporters could not possibly support effective collective bargaining. And this low voter turnout occurred despite the fact that the Board mailed individual notices to each and every occasional teacher who might be interested in the certification application and have an arguable right to vote. The participation rate was far less than would occur in a typical industrial context where the representation vote is conducted at the work place of the employees. But, perhaps, this is not so surprising. Where employees have a common or customary work place, they have the opportunity to debate the pros and cons of union representation and the union has an opportunity (albeit somewhat limited) to contact them. Here, however, the vast majority of occasional teachers do not have a regular attachment to a particular work place, and it is exceedingly difficult for an applicant union to identify who they are or where they live so that they can be approached away from the place where they might, occasionally, be employed. With only sporadic employment by the respondent and without any real exposure to the organizing campaign (here involving two unions) it might be expected that many occasionals would not take the time to vote.

68. The control of representation votes and the determination of the steps necessary to conduct the election fairly are matters which the Legislature has entrusted to the Board. In discharging that responsibility, the Board must ensure that employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or other coercion in violation of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede that choice in a case such as this, is the dispersion of the electorate and the difficulty in disseminating information with respect to the process and the choices available. An employee who has had an effective opportunity to hear the arguments for and against representation is more likely to cast a ballot, and is in a better position to make a more fully informed choice. Accordingly, we think that it is appropriate in cases such as this to remove the unnecessary impediments to communication.

69. As a practical matter, an employer through his possession of employee names and addresses, as well as the immediate ability to communicate with employees on his premises, is assured of the continuing opportunity to inform the entire potential electorate of his views with respect to trade union representation. On the other hand, without a list of employee names and addresses, labour organizations have no effective method by which they can be certain of reaching many of the occasional teachers. There is no automatic right of access to school premises for the purpose of campaigning and, of course, most of the occasionals do not have a regular work place in any event. The problem is exacerbated in the instant case where occasional teachers have been asked to choose one of two unions or a no-union option. As a result, some of the occasionals may be completely unaware of the union's point of view or the relative merits of the options available to them. Nor do employees holding strong views one way or the other have any means of contacting their fellow occasionals to engage in discussion. Lacking names and home addresses, they have no way of effectively communicating with their peers. This is not to deny the existence of various means by which a party *might* be able to communicate with a portion of the electorate even without possessing their names

and addresses. It is rather to say what seems to us obvious – that the access of *all* employees to such communications can be ensured only if all parties have the names and address of all of the voters. In other words, by providing all parties with the employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation, or representation by a particular union (or no union at all), and we minimize the likelihood of anomalous results.

70. In circumstances such as the present case, employee names and addresses are not readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympathetic fellow workers, but, where many occasional teachers are unknown to their fellows, and when most have only a casual attachment to the respondent, let alone a particular school, this method cannot possibly yield the names and addresses of a major proportion of the total complement of occasional teachers. This may well be a burden which a union must bear in the initial organizing stage as it seeks to secure the requisite degree of support to warrant a representation vote, but once that vote has been directed, we see no reason why such information should be withheld. In rejecting the 30/30 rule for what the Board considers a more representative grouping, the Board may have created an additional obstacle which the unions must overcome. However, having crossed the threshold, the policy concern shifts to ensuring a fair and representative election. In our view, that requires a complete disclosure of the names and addresses of potential voters.

71. A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of voters is not uncommon. In public elections, lists of registered voters are open to inspection and are routinely used by interested parties for the purpose of canvassing. We see no reason why similar opportunities should not be available in a representation vote involving a dispersed group of occasional teachers, especially when that vote may well have a more direct and immediate impact on the voters than any federal or provincial election.

72. While the rule we here announce is primarily predicated upon our belief that the prompt disclosure of employee names and addresses is necessary to ensure an informed electorate, there is also another, quite pragmatic basis for our decision. When the actual voters' list is made available to an applicant union (as it presently is), it will typically contain the names of individuals unknown to the union or its supporters. The reasons for this are in large part the same as those that make it difficult for a union to obtain the names of all employees. With little time and no home addresses with which to satisfy itself as to the eligibility of the unknowns, the union is forced either to challenge all those who appear at the polls whom it does not know, or risk having ineligible employees cast ballots. The effect of putting the union to this choice is to increase the number of challenges, as well as the likelihood that challenges might be determinative of the election result, thus requiring investigation by this Board and potential litigation and delay. Prompt disclosure of employee names and addresses may eliminate a number of challenges based solely on a lack of knowledge as to the voter's identity. Furthermore, *bona fide* disputes between employer and union over voter eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board, if such disputes come to light early in the campaign, rather than in the last few days or at the polling booth itself. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of representation questions.

73. The arguments against imposing a requirement of disclosure are of little force, especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret, other than a desire to prevent the union from communicating with his employees – an interest we see no reason to protect, at least in the circumstances of this case. Any legitimate interest in secrecy that an employer may have is, in any event, plainly outweighed by the substantial public interest in favour of disclosure where, as here, disclosure is a key factor in ensuring a free and fair election, and the employees in question have already indicated a substantial interest in self-organization. We do not think that to provide the union with employee names and addresses subjects such employees to the danger of harassment and coercion in their homes. We cannot assume that a union seeking to obtain employees' votes in a secret ballot election will engage in conduct of this nature; and, if it does, the Board can always provide an appropriate remedy. We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as a sufficient basis for denying this opportunity altogether. In this particular case, the electoral grouping is composed of highly educated and sophisticated individuals. We have no doubt that they are quite able to make up their own minds and say no. Indeed, our experience in this series of certification applications is that employees have not complained about union entreaties. Their complaint has been that they did not have enough information about what was going on.

74. For these reasons then, when an application for certification in respect of occasional teachers is made under section 9 of the Act (the pre-hearing vote section), or a vote of occasional teachers is directed under section 7, the respondent employer will be required to file with the Board a list of the names and addresses of all employees known to it to be in the voting constituency. Such list will be available to any person or party with a direct interest in the campaign. Since this is admittedly a new rule in a test case, we are satisfied that it should be applied prospectively only. Further, since most of the occasional teachers will be geographically dispersed, and have no need to visit a particular school, the representation vote should ordinarily be conducted by means of a mailed ballot. While this may build in a little delay, it will enhance the voters' opportunity to conveniently indicate their choice for or against trade union representation. This approach, too, will only be applied to applications in which no vote has yet been directed. While we are satisfied that this approach to the composition of the voting constituency and bargaining unit can fairly be applied to all pending applications, it is unnecessary and inappropriate to set aside votes already taken because a union may not have had the employees' addresses.

75. In view of the foregoing, it will be necessary to reassess the composition of the bargaining unit and the voting constituency in light of the approaches set out above. Once that is done, the Board can determine whether the applicant and intervener have the requisite membership support among employees in the bargaining unit to warrant a counting of the ballots. To this end, a Board Officer is hereby appointed to meet with the parties and endeavour to resolve any remaining disputes concerning the composition of the bargaining unit and voting constituency. The respondent employer is hereby directed to file such additional information concerning its employee complement as may be necessary to apply the one-year rule described in Part VII of this decision.

DECISION OF BOARD MEMBER F. W. MURRAY;

1. I have had the opportunity of considering the majority decision in this matter and must respectfully dissent. In my view, there is no doubt that principals and vice-principals exercise what would be managerial functions within the meaning of section 1(3)(b) of the Act, and even department heads have significant influence over the occasionals' critical job interests. Yet these individuals are all active members of OSSTF, which is here seeking to represent those very same occasional teachers. It seems to me that there is an obvious potential conflict of interest. I simply cannot accept the proposition that an employee organization can include managers and, at the same time, be certified to represent those who are managed. While this flies in the face of the arm's length relationship between employees and unions which is at the heart of our collective bargaining system, I am much more concerned with the increased propensity there will be for conflict of interest for the principals, vice principals, and department heads in their role as day to day administrators of the collective agreement on behalf of the school boards, while at the same time required to be members of the OSSTF. Such division of loyalty and responsibility is bound to dramatically dilute their managerial function.

2. Like the majority, I do not think any useful purpose would be served in reviewing the details of the Board's *Humewood House* decision. The comments in that case relied on by OSSTF are clearly *obiter*, as the dissenting member of the panel in that case indicated in his separate opinion. Not only are we not required to adopt the analysis in the *Humewood House* case, I do not think we should do so. I prefer the decision of the Board in *Hydro Electric Power Commission of Ontario*, *supra*. In my view, the approach in that case is correct as a matter of law and sound industrial relations policy. The case was reaffirmed in *Armour Associates Limited*, *supra*, and, as I read it, *Children's Aid Society of Metropolitan Toronto*, *supra*. The principles in the *Hydro Electric Power Commission of Ontario* case are equally applicable here.

3. I would find that the applicant, OSSTF, is an organization which includes managerial persons who, by definition, are not employees under the *Labour Relations Act*. I would find that, accordingly, OSSTF is not a trade union within the meaning of section 1(1)(p) of the Act and, having managerial personnel among its membership, is not entitled to certification. For that reason, its certification application must be dismissed. Whether the occasional teachers wish to be represented by OPSEU or any other *bona fide* independent trade union is a matter for them to decide, preferably by means of a representation vote.

4. I agree with the majority in the method of determining the voting constituency as outlined in paragraph 65 of the Board's decision.

5. While I note that both unions in this matter were able to show at least an appearance of thirty-five per cent support without any special access to the employees I also agree with the majority decision, particularly in the light of the method adopted to determine the voting constituency, that the special access procedure as outlined in the decision should be made available to interested parties.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1985

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1667-83-R: United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Stearns and Foster Canada Limited (Non-Woven Fabrics), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Stearns and Foster Canada Limited (Non-Woven Fabrics) at Trenton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (31 employees in unit).

0142-84-R: Ontario Public Service Employees Union, (Applicant) v. The Law Society of Upper Canada, Legal Aid Fund, (Respondent).

Unit: "all employees of the respondent in its Provincial Office in the Municipality of Metropolitan Toronto, save and except Secretary to the Controller, Executive Assistants to the Deputy Directors and Provincial Director, Supervisors and persons above the rank of Supervisor, Research Officers, Investigator, Assistant to Collections Manager, Financial Administrator, Internal Auditor, Secretary to the Deputy Director of Appeals, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (89 employees in unit).

1305-84-R: Retail, Wholesale & Department Store Union AFL-CIO:CLC, (Applicant) v. Sears (Simpsons-Sears Limited) (Peterborough, Ontario), (Respondent).

Unit: "all employees of the respondent at its retail store(s) in Peterborough, Ontario, save and except assistant sales managers, supervisors, persons above the rank of assistant sales manager and supervisor, security staff, personnel department staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (88 employees in unit). (*Clarity Note*).

1482-84-R: Sheet Metal Workers International Association, Local Union 504, (Applicant) v. Mechanical Insulations Roofing & Siding Ltd., (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Intervener).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

1508-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Barry Kong Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 4452 Sheppard Avenue East, Scarborough, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (64 employees in unit). (*Having regard to the agreement of the parties*).

1510-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Paler Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 138 Woodlawn Road West, Guelph, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (40 employees in unit). (*Having regard to the agreement of the parties*).

1511-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Valdo Melo Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 2422 Fairview Street, Burlington, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (44 employees in unit).

1512-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. L. DeSousa Enterprises Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1110 O'Connor Drive, Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (58 employees in unit). (*Having regard to the agreement of the parties*).

1513-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Ko-Hag Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 180 Steeles Avenue West, Thornhill, Ontario, save and except assistant hostesses

and persons above the rank of assistant hostess.”(59 employees in unit).(*Having regard to the agreement of the parties*).

1516-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union).

Unit: “all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 9625 Yonge Street, Richmond Hill, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess.”(52 employees in unit).(*Having regard to the agreement of the parties*).

1517-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: “all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 2955 Bloor Street West, Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess.”(76 employees in unit).(*Having regard to the agreement of the parties*).

1520-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Noel Cao Investments Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: “all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1881 Leslie Street, Don Mills, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess.”(54 employees in unit).(*Having regard to the agreement of the parties*).

1521-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: “all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 4211 Yonge Street, North York, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess.”(63 employees in unit).(*Having regard to the agreement of the parties*).

1525-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Perpetual Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: “all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1113 Finch Avenue West, Downsview, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess.”(59 employees in unit).(*Having regard to the agreement of the parties*).

1559-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. J. Xavier Enterprises Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 549 Kerr Street, Oakville, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (31 employees in unit). (*Having regard to the agreement of the parties*).

1560-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Viriato Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1225 Dundas Street East, Mississauga, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (56 employees in unit). (*Having regard to the agreement of the parties*).

1722-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. 506756 Ontario Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 510 Hespeler Road, Cambridge, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (22 employees in unit). (*Having regard to the agreement of the parties*).

1836-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 2877 Bayview Avenue, Willowdale, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (8 employees in unit). (*Having regard to the agreement of the parties*).

1919-84-R: United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Intervener #2).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1800 Sheppard Avenue East, in the City of North York, save and except assistant hostesses and persons above the rank of assistant hostess." (9 employees in unit). (*Having regard to the agreement of the parties*).

2639-84-R: Christian Labour Association of Canada, (Applicant) v. Clarion Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Stoney Creek, Ontario, save and except the administrator, director of nursing, supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (27 employees in unit).

Unit #2: "all employees of the respondent at Stoney Creek, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the administrator, director of nursing, supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff." (11 employees in unit).

2843-84-R: United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. J.J. Derma Meats Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

2938-84-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. The Public Utilities Commission of the Corporation of the Village of Wheatley, (Respondent).

Unit: "all employees of the respondent save and except superintendents, persons above the rank of superintendent, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

3049-84-R: International Union of Operating Engineers, Local 796, (Applicant) v. Morguard Investments Limited, (Respondent).

Unit: "all employees of the respondent at 180 Dundas Street West, and 123 Edward Street, in Metropolitan Toronto engaged in building maintenance and mechanical maintenance, save and except superintendents, persons above the rank of superintendents, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (7 employees in unit). (*Clarity Note*).

3106-84-R: International Union of Bricklayers and Allied Craftsmen - Local #12, (Applicant) v. Dejayko Masonry Ltd., (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

3125-84-R: Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent in its retail store at Fairview Plaza, 200 Fairview Rd. S., Kitchener, save and except store manager and persons above the rank of store manager." (52 employees in unit). (*Having regard to the agreement of the parties*).

3126-84-R: Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent in its retail store at Parkdale Plaza, 478 Albert St., Waterloo, save and except store manager, and persons above the rank of store manager." (38 employees in unit). (*Having regard to the agreement of the parties*).

3127-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Homeward Construction Ltd., Genry Construction Limited, (Respondents).

Unit #1: "all construction labourers in the employ of the respondent Homeward Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent Homeward Construction Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

3205-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Pack-All Crating (Ontario) Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

3212-84-R: Labourers' International Union of N.A. - Local 247, (Applicant) v. Dustbane Enterprises Limited, (Respondent).

Unit: "all employees of Modern Building Cleaning, A Division of the respondent, at the Post Office at 120 Clarence Street, Kingston, Ontario, save and except the supervisor, persons above the rank of supervisor, office, clerical and sales staff and persons regularly so employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in unit).

3226-84-R: Canadian Union of Public Employees, (Applicant) v. Rainy River Valley Health Care Facilities Inc., (Respondent).

Unit #1: "all employees of the respondent at Rainy River, save and except the Director of Services, professional medical staff, graduate and undergraduate nurses, technical and paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and employees in the bargaining units for which any trade union held bargaining rights as of February 26, 1985." (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Rainy River regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the Director of Services, professional medical staff, graduate and undergraduate nurses, technical and paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of February 26, 1985." (11 employees in unit).

3240-84-R: Service Employees Union, Local 183, (Applicant) v. Ontario Humane Society, (Respondent).

Unit: "all employees of the respondent in or out of the Township of Sydney, save and except Managers, and persons above the rank of Manager." (4 employees in unit). (*Having regard to the agreement of the parties*).

3254-84-R: Amalgamated Clothing and Textile Workers Union Toronto Joint Board, (Applicant) v. Metro Sportswear Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, designers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (65 employees in unit). (*Having regard to the agreement of the parties*).

3286-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Family Savings Credit Union (Niagara) Limited, (Respondent).

Unit: "all employees of the respondent at Thorold regularly employed for not more than twenty-four (24) hours per week, save and except supervisors and persons above the rank of supervisor." (5 employees in unit).

3301-84-R: Christian Labour Association of Canada, (Applicant) v. Chatsworth Nursing Home, (Respondent).

Unit #1: "all employees of the respondent in Chatsworth, Ontario save and except supervisors, persons above the rank of supervisor, activity director, registered and graduate nurses, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in the bargaining unit for which any trade union held bargaining rights on March 8, 1985 being the date of the application." (12 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Chatsworth, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, activity director, registered and

graduate nurses, office staff, and persons for whom any trade union held bargaining rights on March 8, 1985 being the date of application.”(8 employees in unit).(*Having regard to the agreement of the parties*).

3314-84-R: United Steelworkers of America, (Applicant) v. Racal-Decca Canada Inc., (Respondent).

Unit:“all employees of the respondent at its Insulators Division in the City of Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.”(10 employees in unit).(*Having regard to the agreement of the parties*).

3321-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit:“all office and clerical employees of the respondent in Chatham, save and except assistant branch controller, persons above the rank of assistant branch controller, buyers, dispatchers, payroll, supervisor, data receiving co-ordinator, sales personnel, confidential secretaries to the distribution manager and branch manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and warehouse personnel covered by a subsisting collective agreement between the parties effective April 1, 1985 until March 31, 1987.”(22 employees in unit).(*Having regard to the agreement of the parties*).

3323-84-R: United Food and Commercial Workers International Union Local 175, (Applicant) v. Hunter Douglas Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in the City of Mississauga, save and except lead hands, persons above the rank of lead hand, office, clerical and sales staff and students employed during the school vacation period.”(38 employees in unit).

3349-84-R: United Food & Commercial Workers International Union, C.L.C.-A.F.L.-C.I.O., (Applicant) v. Stepping Stone Nursing Home, (Respondent).

Unit:“all employees of the respondent in the County of Lanark, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff.”(52 employees in unit).(*Having regard to the agreement of the parties*).

3363-84-R: Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC,AFL,CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit:“all employees of the respondent in its retail store at 700 Strasburg Road, Kitchener, Ontario, save and except manager and persons above the rank of manager.”(100 employees in unit).(*Having regard to the agreement of the parties*).

3364-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Anixter Canada Inc., (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, employees regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

3372-84-R: United Electrical, Radio and Machine Workers of Canada (UE), (Applicant) v. Wellington Wood Products (1972) Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Mount Forest, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (39 employees in unit). (*Having regard to the agreement of the parties*).

3383-84-R: International Brotherhood of Painters & Allied Trades - Local Union 1891, (Applicant) v. Tri-Par Interiors Ltd. (formerly Brass Knob Renovations Inc.) (Province of Ontario & Metropolitan Toronto & Vicinity), (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

3400-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. Cavalier Beverages Limited, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Sudbury, save and except foremen, persons above the rank of foreman, sales representatives, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

3402-84-R: United Food and Commercial Workers Union, Local 409, (Applicant) v. North American Lumber Limited, (Respondent).

Unit: "all employees of the respondent in the City of Thunder Bay, save and except manager, persons above the rank of manager, persons regularly employed for not more than twenty-four hours per week and persons covered by subsisting collective agreements." (17 employees in unit). (*Having regard to the agreement of the parties*).

3418-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. L. Zoratto & Son Carpentry, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

3431-84-R: Christian Labour Association of Canada, (Applicant) v. Lee Manor Home of the Aged, (Respondent).

Unit #1: "all employees of the respondent in Owen Sound save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (39 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Owen Sound, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor and office staff." (20 employees in unit).

3451-84-R: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Gibson Textile Dyers Limited, (Respondent).

Unit: "all employees of the respondent in the City of Toronto, save and except foremen, foreladies, and head shipper, office, clerical and sales staff, plant engineer, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

3456-84-R: Retail Clerks Union Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent in its retail store at 385 Fredrick Street, Kitchener, save and except store manager, and persons above the rank of store manager." (39 employees in unit). (*Having regard to the agreement of the parties*).

3457-84-R: Retail Clerks Union Local 1977, Chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent in its retail store at 54 Wilson Street West, Ancaster, save and except store manager and persons above the rank of store manager." (79 employees in unit). (*Having regard to the agreement of the parties*).

3463-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Sintra Inc., (Respondent).

Unit: "All employees of the respondent at the C.N.R. Watcomb Quarry, in the District of Kenora including the Patricia Portion, save and except foremen, persons above the rank of foreman, office and clerical staff and kitchen staff." (32 employees in unit). (*Having regard to the agreement of the parties*).

3464-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Windsor Wheel & Bumpers (1984) Limited, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (32 employees in unit).

3476-84-R: Sheet Metal Workers' International Association Local Union 537, (Applicant) v. City Heating & Plumbing, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

3478-84-R: Service Employees International Union Local 268, (Applicant) v. Central Park Lodges, (Respondent).

Unit: "all employees of the respondent at Thunder Bay regularly employed for not more than twenty-two and one half (22 1/2) hours per week and students employed during the school vacation period save and except all professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor and foreman, office staff, and persons for which any trade union held bargaining rights as of March 27, 1985." (31 employees in unit). (*Having regard to the agreement of the parties*).

3486-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Loeb Inc. Sudbury Cash and Carry, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Sudbury, Ontario, save and except manager, persons above the rank of manager." (3 employees in unit). (*Having regard to the agreement of the parties*).

3490-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Lambton Kent Memorial Agricultural Centre Board of Management, (Respondent).

Unit: "all employees of the respondent at Dresden, Ontario, save and except manager, persons above the rank of manager, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

0008-85-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Rill Food Services Ltd., (Respondent).

Unit: "all employees of the respondent at 100 Queen St. W. (New City Hall) in the City of Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff." (27 employees in unit). (*Having regard to the agreement of the parties*).

0018-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Comer Construction Ltd., (Respondent).

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0027-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, (Applicant) v. J.B. Allen & Company Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Ideal Plumbing Supplies Division at Hanover, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

0043-85-R: Ontario Nurses' Association, (Applicant) v. Madonna Nursing Home, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at the Madonna Nursing Home, Orleans, save and except Director of Nursing and persons above the rank of Director of Nursing." (7 employees in unit). (*Having regard to the agreement of the parties*).

0060-85-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Reach Plastics Ltd., (Respondent).

Unit #1: "all employees of the Respondent at Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons employed for not

more than twenty-four (24) hours per week and students employed during the school vacation period.”(48 employees in unit).(*Having regard to the agreement of the parties*).

Unit #2:(See: *Applications for Certification Dismissed - No Vote Conducted*).

0070-85-R: The Employees Association of MTE Controls Ltd., (Applicant) v. MTE Controls Ltd., (Respondent).

Unit:“all employees of the respondent working in the County of Essex, save and except foremen, those above the rank of foreman and office and clerical staff.”(47 employees in unit).

0073-85-R: Office & Professional Employees International Union, (Applicant) v. Toronto Musicians Association, (Respondent).

Unit:“all employees of the respondent in the Municipality of Metropolitan Toronto, save and except business representatives, office manager and persons above the rank of office manager.”(14 employees in unit).(*Having regard to the agreement of the parties*).

0094-85-R: Labourers’ International Union of North America, Local 527, (Applicant) v. H. & N. Masonry, (Respondent).

Unit #1:“all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

Unit #2:“all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3163-84-R: Union of Bank Employees Local 2104, C.L.C., (Applicant) v. Cornwall Community Credit Union Limited, (Respondent).

Unit:“all employees of the respondent in the City of Cornwall, save and except manager and loans officer.”(5 employees in unit).

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Ballots segregated and not counted	1

3239-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. BBC Brown Boveri Canada Inc., (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: "all stationary engineers operating in or out of the boiler room of the respondent at its Power Distribution Division in Mississauga." (3 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	0

3288-84-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Wallaceburg, (Respondent) v. Labourers' International Union of North America, Local 749, (Intervener).

Unit: "all employees of the respondent at the Works, Parks and Facilities Departments of The Corporation of the Town of Wallaceburg, save and except foremen, persons above the rank of foreman, office staff, students who work for the school vacation period and persons employed for less than 24 hours per week." (24 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2643-84-R: Food and Services Workers of Canada, (Applicant) v. Windsor Arms Hotel Limited, (Respondent).

Unit: "all employees of the Windsor Arms Hotel Limited in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except: supervisors and assistant supervisors, persons above the rank of supervisor, office staff, musicians, maitres d'hotel, captain-waiters, chefs, sous chefs, chefs de parties who exercise managerial functions and employees covered by subsisting collective agreements." (83 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	109
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	5
Ballots segregated and not counted	10

2990-84-R: Health, Office & Professional Employees, A Division of Local 206, United Food & Commercial Workers, Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Tyndall Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in Mississauga, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff and registered and graduate nurses." (89 employees in unit).

Number of names of persons on list as originally prepared by employer	34
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	8

3010-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener #1) v. Canadian Union of Operating Engineers & General Workers, (Intervener #2).

Unit: "all office and clerical employees of the respondent regularly employed for not more than twenty-four hours per week at 70 Lawrence Avenue West in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretary to National Delivery Manager, personnel staff, security staff, Bonus Administrator, regional merchandise representatives and students employed during the school vacation period." (34 employees in unit).

Number of names of persons on list as originally prepared by employer	34
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	3
Number of spoiled ballots	1
Number of ballots segregated and not counted	1

3055-84-R: Bakery Confectionery & Tobacco Workers International Union Local 264, (Applicant) v. Dare Foods Limited, (Respondent) v. The Employees' Association, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (76 employees in unit). (*Clarity Note*).

Number of names of persons on revised list	70
Number of persons who cast ballots	69
Number of ballots marked in favour of applicant	43
Number of ballots marked in favour of intervener	25
Number of spoiled ballots	1

Applications for Certification Dismissed - No Vote Conducted

2687-83-R: United Food and Commercial Workers International Union, (Applicant) v. 485376 Ontario Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2). (57 employees in unit).

2689-83-R: United Food and Commercial Workers International Union, (Applicant) v. Rahims Food Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).(46 employees in unit).

2830-83-R: United Food and Commercial Workers International Union, (Applicant) v. Famz Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).(40 employees in unit).

1990-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Ltd. c.o.b. as Swiss Chalet, (Respondent).(9 employees in unit).

2089-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Surujnarin Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener #1) v. United Food and Commercial Workers International Union, (Intervener #2).(51 employees in unit).

2852-84-R: International Brotherhood of Painters and Allied Trades Local Union 557, 864, 1003 and 1080 of District Council 46, (Applicant) v. Associated Colour Consultants Ltd., (Respondent).(3 employees in unit).

3123-84-R: Toronto Typographical Union, Local 91, (Applicant) v. Browning-Ferris Industries Ltd., (Respondent) v. Teamsters Local Union No. 419, (Intervener).(32 employees in unit).

3264-84-R: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Delft Blue Farms (Provimi) Inc., (Respondent) v. Group of Employees, (Objectors).(25 employees in unit).

3365-84-R: Hinterhoeller Yachts Employees Association, (Applicant) v. Hinterhoeller Yachts Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 2737, (Intervener).(86 employees in unit).

3389-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Usarco Ltd., (Respondent).(249 employees in unit).

3440-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Trilium Carpentry Ltd. and/or Ramo Carpentry Ltd., (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).(17 employees in unit).

3487-84-R: London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Kitchener-Waterloo Hospital, (Respondent).(501 employees in unit).

0060-85-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers Local 304, (Applicant) v. Reach Plastics Ltd., (Respondent).

Unit #1:(See: *Bargaining Agents Certified - No Vote Conducted*).

Unit #2:“all employees of the Respondent at Mississauga, Ontario, employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff.”(48 employees in unit).

0061-85-R: The Canadian Union of Public Employees, (Applicant) v. Metropolitan Separate School Board, (Respondent) v. Ontario Public Service Employees Union, (Intervener).(65 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2617-84-R: Union Workers of Manufacturing Products and Office Personnel, (Applicant) v. Texturon Inc., (Respondent) v. The International Woodworkers of America, (Intervener).

Unit:“all employees of the respondent in Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(47 employees in unit).

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	22
Number of ballots marked in favour of intervener	22

2618-84-R: Union Workers of Manufacturing Products and Office Personnel, (Applicant) v. Amoco Fabrics Ltd., (Respondent) v. The International Woodworkers of America, (Intervener).

Unit:“all employees of the respondent at Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, laboratory technical personnel, industrial engineering personnel and guards.”(262 employees in unit).(Having regard to the agreement of the parties).

Number of names of persons on revised voters' list	252
Number of persons who cast ballots	239
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	106
Number of ballots marked in favour of intervener	132

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2949-84-R: Graphic Communications International Union, Local 466, (Applicant) v. Moore Business Forms, a division of Moore Corporation Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in the City of Trenton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(223 employees in unit).(Having regard to the agreement of the parties).

Number of names of persons on list as originally prepared by employer	182
Number of persons who cast ballots	175
Number of ballots marked in favour of applicant	81
Number of ballots marked against applicant	94

2962-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (Applicant) v. Rice Tool & Die Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (58 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	48
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	5

2977-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. Rib Time Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Calhoun's Restaurant, 1171 Upper James Street, Hamilton, Ontario, save and except assistant managers and persons above the rank of assistant manager." (75 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised list	73
Number of persons who cast ballots	53
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	34

2990-84-R: Health, Office & Professional Employees, A Division of Local 206, United Food & Commercial Workers, Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Tyndall Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (89 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	56
Number of persons who cast ballots	52
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	32

3000-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Darigold Products Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Oakville, save and except foremen, persons above the rank of foreman, office and sales staff." (74 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	53
Number of persons who cast ballots	53
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	29

3149-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Wajax Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (37 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	50
Number of persons who cast ballots	49
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	25

3213-84-R: Canadian Union of Public Employees, (Applicant) v. Sewer Rooter Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Ottawa, Ontario save and except non-working foremen, persons above the rank of non-working foreman, office staff and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	21
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	18

3302-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Emco Limited, (Respondent).

Unit: "all employees of the respondent in its Emco Supply Division in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (55 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	53
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	33

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1509-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. G. H. Sousa Holdings Inc., (Respondent).

1561-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Manuel Da Silva Foods Ltd., (Respondent).

1839-84-R: Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cabral Foods Inc., c.o.b. as Swiss Chalet, (Respondent).

1858-84-R: United Food and Commercial Workers International Union, (Applicant) v. D. & M. Lau Foods Inc., (c.o.b. as Swiss Chalet Bar B. Q.), (Respondent).

1863-84-R: United Food and Commercial Workers International Union, (Applicant) v. M. Jeronimo Investments Inc., (c.o.b. as Swiss Chalet Bar B. Q.), (Respondent).

1930-84-R: United Food and Commercial Workers International Union, (Applicant) v. William Odorico Investments Ltd. (c.o.b. as Swiss Chalet Bar B. Q.), (Respondent).

1933-84-R: United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited, (c.o.b. as Swiss Chalet Bar B. Q.), (Respondent).

1935-84-R: United Food and Commercial Workers International Union, (Applicant) v. L.M.L. Foods Inc., (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

1936-84-R: United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

2020-84-R: United Food and Commercial Workers International Union, (Applicant) v. C. Calisto Foods Limited (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

2088-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Manuel Goncalves Retaurateur Limited, (Respondent).

2152-84-R: United Food and Commercial Workers International Union, (Applicant) v. Rahims Food Limited, (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

2153-84-R: United Food and Commercial Workers International Union, (Applicant) v. 485376 Ontario Limited (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

2180-84-R;2181-84-R;2182-84-R: United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited, (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

2183-84-R: United Food and Commercial Workers International Union, (Applicant) v. F. G. Andriuolo Foods Inc., (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent).

2433-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Nordal Construction Limited, (Respondent) v. The United Steelworkers of America, (Intervener).

2954-84-R: The Glass, Pottery, Plastics & Allied Workers International Union, (Applicant) v. Karnuk Marble Industries Inc., (Respondent).

3056-84-R: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 431375 Ontario Incorporated, (Respondent).

3057-84-R: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited, (Respondent).

3238-84-R: Service Employees Union, Local 663 A.F.L., C.I.O., C.L.C., (Applicant) v. North Hastings District Hospital, (Respondent).

3450-84-R: National Association of Broadcast Employees and Technicians, (Applicant) v. The Board of Education for the City of London, (Respondent).

3473-84-R: Canadian Union of Public Employees, (Applicant) v. Simcoe Hydro Electric Commission, (Respondent).

3474-84-R: Canadian Union of Public Employees, (Applicant) v. Nanticoke Hydro Electric Commission, (Respondent).

3095-84-R: Butterfield Workers Association, (Applicant) v. Butterfield Inc., a division of Litton Business Systems Ltd., (Respondent).

3305-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Gil Bern Charles Corp. Ltd., (Respondent).

3326-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. D. & B. Watson Sales Ltd., operating as Phelan's Place, (Respondent).

3358-84-R: International Brotherhood of Boilermakers', Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. Sandrin Brothers Limited, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener) v. Group of Employees, (Objectors).

3448-84-R: United Food and Commercial Workers International Union, (Applicant) v. First Choice Hair Cutters Ltd., (Respondent).

3475-84-R: United Food & Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. Custom Plastics International Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0297-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Trillium Carpentry Ltd. and Ramo Carpentry Co. Ltd., (Respondents) v. Labourers' International Union of North America, Local 183, (Intervener).(*Dismissed*).

2199-84-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. DMA Masonry Limited and DeMarinis Construction Limited and DeMarinis (DMA) Inc., (Respondents).(*Withdrawn*).

2997-84-R: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. H. G. Susgin Construction Ltd. and 431375 Ontario Inc., (Respondents).(*Granted*).

3129-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Toronto Millstock Company Limited, (Respondent).(*Withdrawn*).

SALE OF A BUSINESS

2199-84-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. DMA Masonry Limited and DeMarinis Construction Limited and DeMarinis (DMA) Inc., (Respondents).(*Withdrawn*).

2491-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. N. L. Smith Construction Group Inc., and Nordal Construction Co. Limited, (Respondents) v. The United Steelworkers of America, (Intervener).(*Withdrawn*).

3130-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Toronto Millstock Company Limited and Whakatane Holdings Limited, (Respondents).(*Withdrawn*).

UNION SUCCESSOR RIGHTS

1573-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Indusmin Ltd. (Halton Quarry), (Respondent).(*Granted*).

1588-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. St. Lawrence Cement Inc., (Respondent).(*Granted*).

1604-84-R: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Hamilton Automatic Vending Company Limited, (Respondent).(*Granted*).

3184-84-R: Graphic Communications International Union, Local 763-S, Smith Falls, (Applicant) v. Ronalds Federated Limited Ralph-Clark-Stone Packaging Division, (Respondent).(*Granted*).

3185-84-R: Graphic Communications International Union, Local 176-C, Hamilton, (Applicant) v. W. L. Griffin Limited, (Respondent).(*Granted*).

3186-84-R: Graphic Communications International Union, Local N-1, Toronto, (Applicant) v. Southam Murray (A Division of Southam Printing Company Limited), (Respondent).(*Granted*).

3187-84-R: Graphic Communications International Union, Local 766-S, Peterborough, (Applicant) v. Peterborough Paper Converters Inc., (Respondent).(*Granted*).

3188-84-R: Graphic Communications International Union, Local 752-C, Owen Sound, (Applicant) v. The Sun Times, Owen Sound - A Division of Southam Inc., (Respondent).(*Granted*).

3191-84-R: Graphic Communications International Union, Local 195-C, Brantford, (Applicant) v. The Brantford Exposition, A Division of Southam Press (Ont.) Limited, (Respondent). (*Granted*).

3194-84-R: Graphic Communications International Union, Local 590-C, Sudbury, (Applicant) v. The Sudbury Star (A Division of Canadian Newspapers Company Limited), (Respondent).(*Granted*).

3195-84-R: Graphic Communications International Union, Local 669-C, Hamilton, (Applicant) v. The Spectator, A Division of Southam Inc., Hamilton, Ontario, (Respondent).(*Granted*).

3196-84-R: Graphic Communications International Union, Local 62-N, Ottawa, (Applicant) v. Mutual Press Limited, (Respondent).(*Granted*).

3197-84-R: Graphic Communications International Union, Local 688-S, Niagara Falls, (Applicant) v. Pakfold Business Forms, (Respondent).(*Granted*).

3199-84-R: Graphic Communications International Union, Local 691-S, Fergus, (Applicant) v. Moore Business Forms - Division of Moore Corporation Limited, Fergus, Ontario, (Respondent).(*Granted*).

3200-84-R: Graphic Communications International Union, Local 10-C, Toronto, (Applicant) v. Council of Printing Industries of Canada on behalf of Photo Engravers & Electrotypers Limited, (Respondent).(*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2531-84-R: Full Time Security Guards Employed by Trizec Equities Ltd., (Applicant) v. United Plant Guard Workers of America - Amalgamated Plant Guard Workers Local 1962, (Respondent) v. Trizec Equities Limited, (Intervener).

Unit: "all employees of Trizec Equities Limited employed as security guards at Yorkdale Shopping Centre in the Borough of North York in the Municipality of Metropolitan Toronto, save

and except security chiefs, persons above that rank, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (9 employees in unit).(*Granted*).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

2573-84-R: Malcolm G.L. Thomas, (Applicant) v. International Union of Operating Engineers Local 772, (Respondent) v. Domtar Inc., Domtar Chemicals Group, Organic Chemicals Division, (Intervener).

Unit: “all employees of Domtar Inc. Domtar Chemicals Group Organic Chemicals Division at its Chemicals Group Organic Chemicals Division on Strathearne Ave. North in Hamilton, save and except foreman and supervisors, those above the rank of foreman and supervisor, chief engineer, confidential office secretary, persons regularly employed for not more than 24 hours per week, students employed during the school vacation and those employees covered by existing collective agreements.” (9 employees in unit).(*Granted*).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	7

2715-84-R: Doris Wilson et al, (Applicant) v. Technical, Office and Professional Employees Local Union 173-1, (Respondent) v. Labatt’s Ontario Breweries, (Intervener) v. Group of Employees, (Objectors).

Unit: “all employees in the Bargaining Unit employed by the Company at its premises in Waterloo, Ontario, being all office and clerical employees, nurses, and nursing assistants, save and except salesmen, foremen, supervisors, persons above the rank of foreman or supervisor, office manager, sales administrator, confidential secretary to the Plant Manager, confidential secretary to the Personnel Manager, laboratory technicians, students employed during the school vacation period and persons covered by subsisting collective agreements.” (13 employees in unit).(*Granted*).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	8

2738-84-R: Mary Lesley Fodor, Cathy Breedon, Dorothy Joana Maria Fernandes, Michelle Marie Heitzner, Dawna Leigh Thompson, Patti-Ann Spence, (Applicants) v. Canadian Union of Public Employees, and its Local 2484, (Respondent) v. Thomas Toddlers Limited, (Intervener).

Unit: “all employees of Thomas Toddlers Limited at Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for

not more than twenty-four (24) hours per week and students employed during the school vacation period.” (19 employees in unit).(*Dismissed*).

Number of names of persons on revised voters’ list	12
Number of persons who cast ballots	12
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	5

2739-84-R: Michael S. Rempel, (Applicant) v. United Steel Workers of America Local 9075, (Respondent) v. Square D Canada Co. Ltd., (Intervener).(6 employees in unit).(*Withdrawn*).

2740-84-R: James A. McCallum, (Applicant) v. United Steelworkers of America, (Respondent) v. Jensen Steel Ltd., (Intervener).

Unit: “all employees of the respondent working in the Town of Newcastle, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (14 employees in unit).(*Granted*).

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	13

3073-84-R: Viktor Zauner, (Complainant) v. International Brotherhood of Painters and Allied Trades, Local Union 1904, (Respondent).(1 employee in unit).(*Withdrawn*).

3145-84-R: Richard Stokes, et al, (Applicants) v. Graphics Communications International Union, Local 500-M, Toronto, Ontario, (Respondent) v. Council of Printing Industries of Canada on behalf of Batten Gravure Cylinders Limited, (Intervener) v. Group of Employees, (Objectors).(35 employees in unit).(*Dismissed*).

3380-84-R: Normand Dupuis, (Applicant) v. Retail, Wholesale and Department Store Union, Local 579, (Respondent).(*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0046-85-U: Ontario Hydro, (Applicant) v. Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees’ Union Local 1000, Al Beath, Dave Hepburn, Dave Hamilton, Dave Cooper, G. Messer, Cam Fraser, T. Potter, J. Miscione, Wagne Dent, Chuck Paquette, Fred Snow, Jim Vernelli, Bill Graham, John Brisimitzis, Lloyd Church, Harry Forrester, Harry Vanderzwet, John Smith, Jim Leslie, A. Zwaigenbaum, B. Watson, M. Thacker, D. Dudley, Rudy Bronkhorst and R. Lukas, (Respondents).(*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3382-84-U;3396-84-U: Brewery, Malt and Soft Drink Workers, Local 304, and Canadian Union of Brewery and General Workers 325, (Applicant) v. Molson Ontario Breweries Limited, Carling O’Keefe Transport Limited, Carling O’Keefe Breweries of Canada Limited, and Harry F. Weininger, (Respondents).(*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2213-83-U: Donald Y. Dawson, (Complainant) v. The Labourers' International Union of North America, Local 183, (Respondent).(*Withdrawn*).

2944-83-U: United Food and Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. Krinos Foods Canada Ltd., (Respondent).(*Granted*).

0324-84-U: United Food and Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. 555618 Ontario Limited, (Respondent).(*Withdrawn*).

0388-84-U: Ontario Public Service Employees Union, (Complainant) v. Port Colborne Ambulance Service Centre, (Respondent).(*Granted*).

0526-84-U: United Food and Commercial Workers International Union, (Complainant) v. Rahims Food Limited, (Respondent) v. Canadian Union of Restaurant & Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, and Canadian Union of Restaurant and Related Employees, (Interveners).(*Withdrawn*).

1066-84-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Simpsons Limited, (Respondent).(*Dismissed*).

1135-84-U: United Food and Commercial Workers International Union, (Complainant) v. 124646 Canada Inc., (Respondent).(*Withdrawn*).

1313-84-U: Catherine Whittaker, (Complainant) v. Service Employees Union Local 268, (Respondent) v. The McCausland Hospital, (Intervener).(*Dismissed*).

1442-84-U: International Association of Machinists and Aerospace Workers, Local Lodge 1184, (Complainant) v. Parker Pen Canada Limited, (Respondent).(*Granted*).

1472-84-U: United Food and Commercial Workers International Union, (Complainant) v. Luis Pereira, 548280 Canada Inc., Cara Operations Limited and Frank Charron, (Respondents).(*Withdrawn*).

1714-84-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Simpsons Limited, (Respondent).(*Withdrawn*).

1807-84-U: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees, Local 88, (Complainant) v. 412873 Ontario Limited, (Respondent).(*Withdrawn*).

1809-84-U: Robert Williams, (Complainant) v. Teamsters Union Local 647, (Respondent) v. Monarch Fine Foods Co. Ltd., (Intervener).(*Dismissed*).

1810-84-U: Robert Williams, (Complainant) v. Monarch Fine Foods Co. Ltd., (Respondent).(*Dismissed*).

1883-84-U: United Food and Commercial Workers International Union, (Complainant) v. 124646 Canada Inc., Luis Pereira, 548280 Ontario Inc., Cara Operations Limited, and Frank Charron, (Respondents).(*Withdrawn*).

1893-84-U: Canadian Union of Public Employees - C.L.C., Ontario Hydro Employees Union, Local 1000, (Complainant) v. Ontario Hydro, Electrical Power Systems Construction Association, International Brotherhood of Electrical Workers, Labourers International Union of North America, United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, International Association of Bridge, Structural and Ornamental Ironworkers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Association of Heat and Frost Insulators and Asbestos Workers, United Brotherhood of Carpenters and Joiners of America, Operative Plasterers and Cement Masons International Association, International Union of Operating Engineers, International Brotherhood of Painters and Allied Trades, Sheet Metal Workers International Association, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and International Brotherhood of Bricklayers and Allied Craftsmen, (Respondents).(*Dismissed*).

1948-84-U: Raphael A. Julien, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Respondent).(*Dismissed*).

2075-84-U: 548280 Ontario Inc., (Complainant) v. United Food and Commercial Workers International Union, (Respondent).(*Withdrawn*).

2084-84-U: United Food & Commercial Workers International Union, (Complainant) v. 555618 Ontario Limited, (Respondent).(*Withdrawn*).

2207-84-U: Ontario Public Service Employees Union, (Complainant) v. Port Colborne Ambulance Service Centre, (Respondent).(*Granted*).

2266-84-U;2267-84-U: Retail Commercial & Industrial Union Local 206 chartered by the United Food and Commercial Workers International Union, (Complainant) v. G. Paquette Foods Ltd., (Respondent).(*Withdrawn*).

2294-84-U: United Food & Commercial Workers International Union, (Complainant) v. 485376 Ontario Limited, (Respondent).(*Dismissed*).

2301-84-U: Canadian Union of Restaurant and Related Employees, (Complainant) v. Surujnarin Foods Ltd., (Respondent).(*Withdrawn*).

2656-84-U: United Food & Commercial Workers International Union, (Complainant) v. 555618 Ontario Limited, (Respondent).(*Dismissed*).

2688-84-U: Canadian Textile & Chemical Union, (Complainant) v. Union Felt Products (Ontario) Limited, (Respondent).(*Withdrawn*).

2707-84-U: United Food and Commercial Workers International Union, (Complainant) v. Cara Operations Limited c.o.b. as Swiss Chalet Bar-B-Que and all other employers listed on Schedule "A" attached hereto, (Respondents) v. Canadian Union of Restaurant and Related Employees, (Intervener).(*Withdrawn*).

2752-84-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Westburne Industrial Enterprises Ltd., (Respondent).(*Withdrawn*).

2835-84-U: Viceroy Rubber & Plastics Limited, (Complainant) v. The Honourable Russell Ramsay, Minister of Labour and Morrie Zucker, (Respondents).(*Withdrawn*).

2856-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. Canada's Capital Building Services Limited, (Respondent).(*Withdrawn*).

2893-84-U: Mrs. Jeanette Kirkpatrick, (Complainant) v. The Corporation of the Town of Oakville its servants and agents, (Respondent) v. Canadian Union of Public Employees and its Local 1329, (Intervener).(*Withdrawn*).

2920-84-U: Christian Labour Association of Canada, (Complainant) v. Service Employees' International Union, Local 204 and Beverly Enterprises Canada Limited (formerly Bestview Holdings Limited and Bestview Services Limited), (Respondents).(*Dismissed*).

2951-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. Canada's Capital Building Services Ltd., T. Zigoumis, J. Zigoumis, C. Zigoumis and Gus Zigoumis, (Respondents).(*Withdrawn*).

2956-84-U: International Union of Operating Engineers, Local 793, (Complainant) v. W. L. McDace Limited, (Respondent).(*Withdrawn*).

2981-84-U: Robert H. Wilson, (Complainant) v. Ontario Public Service Employees Union, (Respondent).(*Withdrawn*).

3008-84-U: Office & Professional Employees International Union, Local 343, (Complainant) v. The Ontario Secondary School Teachers Fraternal Society and the Ontario Secondary School Teachers Sick Benefit Society, (Respondent).(*Withdrawn*).

3021-84-U: Donald Vasseur, (Complainant) v. Labourers' International Union of North America, Local 1059, (Respondent).(*Dismissed*).

3041-84-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Westburne Industrial Enterprises Ltd., (Respondent).(*Withdrawn*).

3051-84-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Bomar Coating Incorporated, (Respondent).(*Withdrawn*).

3054-84-U: Ontario Public Service Employees Union, (Complainant) v. Port Colborne Ambulance Service Centre, (Respondent).(*Granted*).

3071-84-U: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. H.G. Susgin Construction Ltd., 431375 Ontario Incorporated, The Great Atlantic and Pacific Company of Canada Limited, (Respondents).(*Withdrawn*).

3077-84-U: Joseph White, (Complainant) v. Local #43 C.U.P.E., (Respondent).(*Withdrawn*).

3081-84-U: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, (Complainant) v. Cara Operations Limited, c.o.b. as Swiss Chalet Bar-B-Q, and all other Employers listed in Schedule "B" attached hereto, (Respondents).(*Withdrawn*).

3084-84-U: United Food and Commercial Workers International Union, Local 114-4P, (Complainant) v. Research Foods Ltd., (Respondent).(*Withdrawn*).

3099-84-U: Kevin Gurnsey, Phillip Powers, Rob Poitras, Jeff Combe, (Complainants) v. The United Brotherhood of Carpenters & Joiners of America - Local 1030, and Elbertsen Industries Limited, (Respondents).(*Withdrawn*).

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3109-84-U: Joe De Sousa, (Complainant) v. Molson Breweries (Toronto) Ltd. and/or Local 304 of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent).(*Withdrawn*).

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3152-84-U: Robert Wayne Fleming, (Complainant) v. United Steelworkers, Local 4151, Ed Tait Pres., (Respondent).(*Withdrawn*).

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3206-84-U: Gerald E. Dobie, (Complainant) v. International Association of Machinists and Aerospace Workers Local 1863 (Union), (Respondent).(*Withdrawn*).

3209-84-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Complainant) v. 3-L Filters Limited, (Respondent).(*Withdrawn*).

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3235-84-U: Lorna Clements, (Complainant) v. United Food & Commercial Workers (Local 206), (Respondent) v. Canada Safeway Limited, (Intervener).(*Withdrawn*).

3236-84-U: Mrs. Margaret Parks, (Complainant) v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union, Local 1414J, (Respondent) v. Xerox Canada Inc., (Intervener).(*Dismissed*).

3245-84-U: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Smith's Southwestern Services Inc., (Respondent).(*Withdrawn*).

3246-84-U: Susan Manders, (Complainant) v. Central Box and Containers Ltd., (Respondent).(*Withdrawn*).

3253-84-U: International Union of Elevator Constructors, Local 90, (Complainant) v. Westinghouse Canada Inc., (Respondent).(*Withdrawn*).

3284-84-U: Maria C. Carvalho, (Complainant) v. Service Employees Union, Local 204, (Respondent).(*Withdrawn*).

3285-84-U: United Food and Commercial Workers International Union, Local 1000A, (Complainant) v. Sunnybrook Foods Limited, (Respondent).(*Withdrawn*).

3352-84-U: Labourers' International Union of North America, Local 527, (Complainant) v. Gil Bern Charles Corp. Ltd., (Respondent).(*Withdrawn*).

3369-84-U: Athalbert Roberts, (Complainant) v. Winston Curtis, (Respondent).(*Withdrawn*).

3434-84-U: Janice Rae Anne Sokoloski, (Complainant) v. Service Employees Union Local 268, (Respondent).(*Withdrawn*).

3443-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. D. & B. Watson Sales Ltd., operating as Phelan's Place, (Respondent).(*Withdrawn*).

3471-84-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Complainant) v. 3-L Filters Limited, (Respondent).(*Withdrawn*).

0003-85-U: Hans Jensen 222 Greencedar Dr. Hamilton L9C 6W6, (Complainant) v. Hamilton Street Railway 18 Wentworth N. & ATU Local 107 33 Aikman Ave. President Klaus Klad 45 Gertrude St. Hamilton L8L 4B7 Recording Secretary Gary Arsenault 280 Weir St. N. Apt. 3 L8H 3G3, (Respondents). (*Withdrawn*).

0014-85-U: United Food and Commercial Workers International Union, (Complainant) v. Maciver and Lines Ltd., (Respondent).(*Withdrawn*).

0015-85-U: Service Employees International Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Complainant) v. Albright Gardens Homes Incorporated, (Respondent).(*Withdrawn*).

0034-85-U: Canadian Union of Public Employees, (Complainant) v. Big Brothers of Hamilton and District Inc., (Respondent).(*Withdrawn*).

0049-85-U: Canadian Textile & Chemical Union, (Complainant) v. Union Felt Products (Ontario) Limited, (Respondent).(*Withdrawn*).

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1640-84-M: The Canadian Union of Public Employees, Local 1559, (Applicant) v. The Corporation of Leeds, Grenville and Lanark District Health Unit, (Respondent).(*Dismissed*).

3135-84-M: Canadian Union of Public Employees, Local 133, Humane Society Unit, (Applicant) v. Niagara Falls Humane Society, (Respondent).(*Withdrawn*).

3296-84-M: CUPE - CLC, Ontario Hydro Employees Union, Local 1000, (Applicant) v. Ontario Hydro (Janitorial/Handyman Work - Orangeville), (Respondent).(*Withdrawn*).

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3375-84-M: Sudbury & District Ambulance Service, (Applicant) v. Canadian Union of Public Employees and its Local 2412, (Respondent).(*Withdrawn*).

3387-84-M: Canadian Union of Public Employees and its Local 1813, (Applicant) v. The District of Muskoka, (Respondent).(*Withdrawn*).

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1734-84-OH: W. J. McCorkell, Ottawa-Carleton Public Employees Union Local 503, C.U.P.E., 2000 Falkirk Cres., Gloucester, Ontario, K1B 4Y7, (Complainant) v. P. O'Brien,

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3035-84-OH: United Electrical, Radio & Machine Workers of Canada (UE) Local 520, (Complainant) v. El-Met Parts, Division of Toromont Industries Ltd., (Respondent).(*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

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3067-84-U: Ontario Public Service Employees Union, (Complainant) v. Algonquin College of Applied Arts and Technology, (Respondent).(*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

0785-84-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837, (Applicant) v. Kopic Wrecking Inc., (Respondent).(*Withdrawn*).

0957-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ellis-Don, (Respondent).(*Granted*).

0963-84-M: Ontario Allied Construction Trades Council and Labourers International Union of North America Local 597, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondents).(*Granted*).

1812-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, Local 552, (Applicant) v. Gianotti Plumbing and Heating Company Limited, (Respondent).(*Granted*).

2071-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Gargaro & Son Carpentry Limited, (Respondent).(*Withdrawn*).

2456-84-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Panama Villas Inc. c.o.b. as D. Azzolin Plastering & Drywall, (Respondent).(*Granted*).

2469-84-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. 139867 Ontario Ltd. (formerly R. Davidson Electrical Contractors Limited), (Respondent).(*Withdrawn*).

2555-84-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. L-K Acoustic & Drywall (1983) Ltd., (Respondent).(*Withdrawn*).

2637-84-M: United Brotherhood of Carpenters and Joiners of America, Local #494, (Applicant) v. Dominion Stores Limited, (Respondent).(*Granted*).

2697-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. F. Ferri Carpenters, (Respondent).(*Withdrawn*).

2733-84-M;2734-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Wilon Excavating & Grading Ltd., (Respondent).(*Granted*).

2755-84-M: Sheet Metal Workers International Association Local Union 504, (Applicant) v. Biscombe B.R.S. Limited, (Respondent).(*Granted*).

2807-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Lanewood Corp., (Respondent).(*Granted*).

2895-84-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, and The International Brotherhood of Painters and Allied Trades, Local 1891 and The International Brotherhood of Painters and Allied Trades District Council 46, (Applicants) v. A. J. Bolla Protective Coatings and Decorating Ltd., (Respondent).(*Withdrawn*).

2998-84-M: Lake Ontario District Council, (Applicant) v. H. G. Susgin Construction Ltd., (Respondent).(*Granted*).

3124-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853, (Applicant) v. Aquatic Fire Protection Limited, (Respondent).(*Granted*).

3217-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. King Paving & Materials Ltd., (Respondent).(*Withdrawn*).

3219-84-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Herbert Brune Construction Ltd., GR Brune Construction Inc., (Respondent).(*Granted*).

3228-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. M. M. Construction Company Limited, (Respondent).(*Withdrawn*).

3241-84-M: Teamsters Union Local 91, (Applicant) v. Dufresne Piling Co. Ltd. (1967), (Respondent).(*Withdrawn*).

3247-84-M: The International Brotherhood of Electrical Workers, on its own behalf and on behalf of Local Union 353, (Applicant) v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and Agincourt Electrical Contracting Company, (Respondent).(*Granted*).

3263-84-M: International Brotherhood of Electrical Workers L.U. 105 Hamilton of the IBEW Construction Council of Ontario, (Applicant) v. Cooper Electric, (Respondent).(*Granted*).

3316-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local

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3348-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. McBrien Insulation, (Respondent).(*Withdrawn*).

3353-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Frank Plastina Investments Limited, (Respondent).(*Withdrawn*).

3374-84-M: Resilient Floorworkers, Local Union 2965 U.B.C.J.A., (Applicant) v. Ellis-Don Limited, (Respondent).(*Withdrawn*).

3377-84-M: Labourers' International Union of North America, Local 527, (Applicant) v. Joe Arban Contractor Ltd., (Respondent).(*Granted*).

3378-84-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Paul K. Mace Interior Supply, (Respondent).(*Granted*).

3390-84-M: Resilient Floorworkers Local 2965/1465 United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aldershot Flooring, (Respondent).(*Granted*).

3391-84-M: United Brotherhood of Carpenters and Joiners of America, Local 249, (Applicant) v. H. G. Susgin Construction Ltd. 431375 Ontario Incorporated, (Respondent).(*Granted*).

3406-84-M: Ontario Council of the International Brotherhood of Painters & Allied Trades and Local 1824 of the International Brotherhood of Painters & Allied Trades, (Applicant) v. Three Bell Painters Limited, (Respondent).(*Withdrawn*).

3414-84-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Joe Capone's Painting and Decorating Limited, (Respondent).(*Granted*).

3436-84-M: Labourers Int. Union of North America, Local 506, (Applicant) v. Humber Plumbing and Heating Ltd., (Respondent).(*Withdrawn*).

3465-84-M: Local 200 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Dupont Painting Contracting Ltd., (Respondent).(*Withdrawn*).

0006-85-M: Teamsters Local Union No. 230, (Applicant) v. Andrew Paving & Engineering Ltd., (Respondent).(*Withdrawn*).

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0023-85-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 721, (Applicant) v. Taunton Fabricating Ltd., (Respondent).(*Granted*).

0028-85-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Pat Desmarais Mechanical Insulation, (Respondent).(*Withdrawn*).

0041-85-M: Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598, (Applicant) v. 361870 Ontario Limited carrying on business as ARA Concrete Finishing, (Respondent).(*Granted*).

0051-85-M: International Brotherhood of Electric Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. L. G. Barrett Electric Ltd. 140 Finchdene Square, Unit 2, Scarborough, Ontario, M1X 1B1, (Respondent).(*Withdrawn*).

0057-85-M: Resilient Floorworkers, Local Union 2965, (Applicant) v. Aldershot Flooring Limited, (Respondent).(*Withdrawn*).

0064-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. A. V. Curb and Sidewalk, (Respondent).(*Withdrawn*).

0065-85-M: The Labourers' International Union of North America, Local 183, (Applicant) v. Sivi Construction Limited, (Respondent).(*Withdrawn*).

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0085-85-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Paul K. Mace Interior Supply, (Respondent).(*Granted*).

0103-85-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Trojan Interior Contracting Limited, (Respondent).(*Withdrawn*).

0105-85-M: Labourers' International Union of North America, Local 506, (Applicant) v. Buttcon Limited, (Respondent).(*Withdrawn*).

0122-85-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicants) v. Hildron Investments Limited, (Respondent).(*Granted*).

0138-85-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Paul K. Mace Interior Supply Ltd., (Respondent).(*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3222-84-U: Robert Williams, (Applicant) v. Monarch Fine Foods Company Limited, (Respondent).(*Denied*).

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M7A 1V4*

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ONTARIO LABOUR RELATIONS BOARD REPORTS

June 1985



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

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NOTICE

SERVICE REQUIREMENTS

A notice published in the May, 1985 issue of the Ontario Labour Relations Board Reports announced the amendment of Practice Note No. 5, whereby paragraphs 5, 6, 7 and 8 were added to the practice note. In setting out the new paragraph 6, the words "or does" were inadvertently omitted in the second line of that paragraph, between the words "does" and "not".

Thus the new paragraph 6 should read as follows:

6. The service requirements contained in paragraph 5 above shall not apply where the document or correspondence discloses whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

Practice Note No. 5, with the amendments effective November 1, 1985, will read in full as follows:
(Sections added by amendment in bold)

PRACTICE NOTE NO. 5

December 10, 1962, as amended October 18, 1971, and November 1, 1985.

SERVICE OF DOCUMENTS AND NOTIFICATION OF PROCEEDINGS BY THE BOARD

1. One copy of all notices, documents and correspondence will be served by the Board on each of:

- (a) the parties to the proceedings;
- (b) the parties named in the proceedings as having an interest;
- (c) persons whom the Board believes to have an interest.

2. In addition to the foregoing, each of the parties or persons so served will be allowed to inform the Board in writing of the name and address of one additional designated person and the Board will serve on such person a copy of all notices, documents and correspondence in the proceedings.

3. If during the course of any proceedings, a party notifies the Board that it desires the additional copy of such notices, documents and correspondence to be served on a different designated person (whose name and address must be given) all subsequent notices, documents and correspondence will be served on the new person designated and no further service will be made on the former designated person.

4. Where in any case, a counsel or advocate is named as representing a party, a copy of all subsequent notices, documents and correspondence in that case, will be served on such counsel or advocate in addition to the other services set out herein.

5. Notwithstanding paragraphs 1 to 4, unless the Board otherwise specifically directs, after the first scheduled hearing date in the proceeding it is the responsibility of a party or participant who files any document or correspondence with the Board to serve a copy of the document or correspondence on all those entitled to notice. Any such document or correspondence so filed with the Board must be accompanied by a statement that the party filing it has effected the service required by this paragraph.

6. The service requirements contained in paragraph 5 above shall not apply where the document or correspondence discloses whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

7. Should any dispute arise over service of documents or correspondence referred to in paragraph 5, the onus of proving service shall lie upon the party or participant seeking to rely on the said document or correspondence.

8. If documents or correspondence are not served as required herein, the Board may refuse to consider such documents or correspondence, or may consider them on such terms or conditions as it deems appropriate.

N.B. Service on persons other than the parties to the proceedings and their counsel or advocates is a matter of courtesy only.

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1532-84-U United Brotherhood of Carpenters and Joiners of America, Complainant, v. Aristokraft Vinyl Inc., Respondent

Duty to Bargain in Good Faith - Evidence - Interference in Trade Unions - Lockout - Unfair Labour Practice - Whether refusal to agree to compulsory union membership clause bad faith bargaining - Whether extended use of temporary lockout replacements unlawful - Whether lockout otherwise timely rendered illegal by unlawful motive - Whether contracting out or permitting employees to work during lockout unlawful - Extent of right of locked out employees to return to work - Whether evidence as to discussions with mediator admissible

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *F. Burnet* and *P. J. O'Keeffe*.

APPEARANCES: *Douglas J. Wray*, *Walter Oliveira* and *T. G. Harkness* for the complainant; *M. G. Horan* and *Hindy Stegman* for the respondent.

DECISION OF THE BOARD; June 12, 1985

1. The United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as the union, filed this complaint alleging that Aristokraft Vinyl Inc., hereinafter referred to as the company, violated sections 15, 64, 66, 70, 72, 75 and 80 of the *Labour Relations Act*. The complaint was filed on September 13, 1984, approximately one and a half weeks after the company commenced a timely, but allegedly unlawful, lock-out of the majority of the employees in the bargaining unit represented by the union. The complaint before us relates to the conduct of the company and the union from the time the union served notice to bargain on the company shortly after the Board certified the union in March of 1984 to the first hearing in this matter which took place about two months after the lock-out began.

2. The union was certified on March 13, 1984. The union's notice to bargain, dated March 22, 1984, was served on the company and requested a first meeting during the week of April 9, 1984. The company's reply, in writing, was prompt and suggested a meeting on April 11, 1984 after 3:00 p.m. at a location to be determined by the union. The first meeting took place at the union's premises at 5:30 p.m. on April 19, 1984. The company's negotiating team was comprised of Marvin Zeifman, the sales manager of the company, Jerry Zeifman, Marvin Zeifman's brother and the marketing director of the company, and Hindy Stegman, the company's general manager and the Zeifmans' sister. Two employees of the company and Walter Oliveira, the full-time business agent for the union's Local 2679 were the members of the union's negotiating team. The arrangements for the meeting were made by Mr. Marvin Zeifman and Mr. Oliveira, who also were the spokesmen for their respective negotiating teams. The first meeting lasted approximately a half hour. The union presented the company with a document containing its opening proposals. The company negotiating team briefly reviewed the document and then suggested that the meeting adjourn in order to permit the company negotiating team to carefully study the union's proposals and prepare a reply to it.

3. Mr. Jerry Zeifman testified that Mr. Oliveira, in presenting the document to the company, suggested that it was a good agreement and that the company could sign it that day. Mr. Oliveira denied suggesting at that meeting that the company should sign the document.

In our view, it is not material to the outcome of this case to resolve that particular factual issue. There were similar types of differences between the evidence of the company's witnesses and the union's witnesses. However, most, if not all of those differences can be attributed to differing perceptions of the events, and imperfect recall, rather than a deliberate attempt on the part of a witness to mislead the Board. It appears to us that the material evidence relating to the parties' observable conduct was not in conflict, although we are asked to draw different inferences from that evidence and conduct.

4. At the meeting of April 19th, Mr. Oliveira asked the company to provide the union with a list for the next meeting showing the employee's names and wages. The company prepared the list requested and gave it to the union at the next meeting, which was held on Friday, June 1, 1984 at the union's premises. That second meeting was arranged over the telephone by Mr. Marvin Zeifman and Tom Harkness, the union's Canadian Director of Organizing. The company had proposed to meet with the union on Saturday, June 2nd or Sunday, June 3rd, as well as on Friday, June 1st when the June 1st meeting was arranged orally and later confirmed in writing by a letter from Mr. Marvin Zeifman to Mr. Harkness.

5. At the June 1st meeting, Mr. Harkness advised the company that he would be the union's spokesman, and Mr. Jerry Zeifman advised the union that he would be the company's spokesman. The company presented the union with a document containing its collective bargaining proposals that had been prepared by the company negotiating team in consultation with its legal counsel. The union committee briefly reviewed it, and advised the company that they would need time to review and study it. The second meeting lasted approximately a half hour.

6. The third meeting between the parties took place on Sunday, June 3, 1984, at the union's premises. That meeting was not a productive one. The company wished to negotiate using the document containing its proposals as a basis for discussion, while the union wanted to negotiate using the document it had presented to the company at the first meeting. Mr. Harkness advised the company that its proposals were not acceptable to the union committee. The union then introduced a new proposal, which was the master agreement between the union's Local 2679 and members of the Canadian Woodwork Manufacturers Association. There were some discussions about the purpose clause, geographic area to be covered by the agreement, probationary period, union security, grievance procedure, overtime, statutory holidays and vacations. Those discussions were quite heated, with shouting and exchanges of obscenities.

7. At that meeting, Mr. Jerry Zeifman had asked Mr. Harkness whether the union was prepared to be flexible with respect to its proposals, as set out in the Canadian Woodwork Manufacturers Association agreement. Mr. Harkness testified in examination-in-chief that his response to Mr. Zeifman's question was that there was flexibility in some areas, such as travel allowance, union label and cost of living, and no flexibility at all in respect of probationary period, hours of work, vacation pay and statutory holidays. Mr. Harkness also stated that its demand for a union shop, that is, all employees to become and remain union members after completion of the probationary period would not be moderated. Mr. Harkness explained to the Board that the union could *not* change any of those provisions because if it did, the other companies that were bound by the Canadian Woodwork Manufacturers Association agreement would also want those changes which, in Mr. Harkness's opinion, would have caused "real problems" for the union.

8. During the course of that third meeting, Mr. Harkness referred to a completed, but

unsigned application for appointment of a conciliation officer, and made it clear to the company that unless there was some progress, the union would be requesting conciliation. The company's response was that there should be further meetings before the union resorted to the conciliation process. The meeting ended with the company indicating to the union that it wanted more time to study the Canadian Woodwork Manufacturers Association contract. The meeting had started at about 10 a.m. and had concluded at about noon. Nothing had been agreed to at that meeting. Indeed, the parties had not even agreed to the document which might form the focus of the discussions.

9. At the close of the June 3rd meeting, the company indicated that it would get back to the union with further dates for meetings within the next week. Mr. Jerry Zeifman spoke with Mr. Oliveira on Friday June 8th, and confirmed the conversation by letter to Mr. Oliveira dated June 14, 1984. Mr. Oliveira, in his examination-in-chief, testified that Mr. Zeifman's June 14, 1984 letter set out the conversation that he had had with Mr. Zeifman. That letter stated:

"Dear Walter:

Regarding meeting for contract negotiations I undertook to call you back respecting dates for continuing our negotiations. When I called you on June 8th to tell you that we would like to meet with you on Friday, June 15th and Saturday June 16th you told me you had already applied for the appointment of a conciliation officer.

Under these circumstances I think that we would be best advised to meet with the officer after his appointment. It is unfortunate that at such early stage of negotiations you feel a need for a conciliator.

Sincerely,

ARISTOKRAFT VINYL INC.

Jerry Zeifman"

Although Mr. Oliveira indicated that the union was prepared to meet with the company prior to the appointment of a conciliation officer, the union did not specifically request the company to meet with it prior to the meeting with the conciliation officer.

10. The conciliation officer convened a meeting with the parties on July 25, 1984. Mr. Jerry Zeifman testified that prior to the conciliation meeting, the company carefully studied the union's proposals, as set out in the Canadian Woodwork Manufacturers Association agreement. He said that the company felt that there were areas in it that were inapplicable to its operations, other areas that were acceptable in principle, and other areas, such as probationary period, union security, and grievance procedures, that had to be negotiated. The company also compared the union's proposals with a collective agreement between another union and an employer carrying on a similar business to that of the company.

11. At the conciliation meeting, the company agreed to use the union's second proposal, the Canadian Woodwork Manufacturers Association agreement, as a basis for discussions. The parties agreed to a purpose clause and a recognition clause. The union agreed with the company's position that the recognition clause reflect the Board's certificate. The next area

for discussion was the probationary period. The company's proposal was unacceptable to the union. Mr. Jerry Zeifman testified that Mr. Harkness, who continued to be the union's spokesman, made it clear to the company that because the company was a woodworking company, and as the Canadian Woodwork Manufacturers Association agreement was the agreement for that industry, the Canadian Woodwork Manufacturers Association agreement was the one the union wanted. Mr. Zeifman responded by saying that the company was not a woodworking company, or a cabinet shop, but rather was engaged in the converting or laminating business (that is, applying different materials, such as papers, foils or vinyls to various media, such as hardboard or particle board). Mr. Zeifman also advised the union that the company wanted the agreement to reflect the kind of business in which the company was engaged. It was made clear by Mr. Harkness that the union would not move from its position with respect to the probationary period and union security. The company explained to the union why it thought that the union's proposals were not acceptable. Negotiations then broke down. The union committee discussed the conduct of negotiations up to that point and formed the opinion that little progress had been made. Mr. Oliveira and Mr. Harkness met with the conciliation officer in the presence of Mr. Jerry Zeifman and Ms. Stegman and requested a no-board report be issued. Mr. Zeifman commented at that point that he thought a no-board report was premature. The conciliation meeting ended at about 5 p.m. on that day. The no-board report was issued on August 8, 1984.

12. Mr. Jerry Zeifman testified that following the no-board report, he spoke with Mr. Harkness and with a mediator to arrange a mediation meeting and suggested August 20 or 21, 1985. Mr. Harkness did not recall speaking to Mr. Zeifman about the mediation meeting. Mr. Harkness did remember that August 20 and August 21 were dates suggested for mediation but that they were not acceptable to the union because he could not attend a mediation meeting on those dates. The parties agreed to a mediation meeting on August 31, 1985, which was the Friday before the Labour Day long weekend and after the date on which a timely strike or lock-out could take place. The parties agreed, through the mediator, that they would not resort to economic sanctions until the mediation meeting had taken place. That agreement was confirmed by a telegram from the mediator to the parties. That telegram stated:

"Will convene mediation meeting [sic] between Aristokraft Vinyl Inc. and United Brotherhood of Carpenters and Joiners of America Friday August 31, 1984 ten a.m. Boardroom fifth floor Ministry of Labour 400 University Avenue Toronto Ontario Both parties have undertaken that there will be no interruption in the operation prior to the conclusion of this meeting."

Mr. Zeifman did not recall receiving the telegram but agreed that such an undertaking was given by the company.

13. Both parties wished to adduce evidence about what was said by them to the mediator and what was said by the mediator to them in the absence of the other party to establish the truth of what was said by the mediator, that is, for a hearsay purpose. The Board raised its concern about the admissibility of such evidence, but permitted that evidence to be adduced since neither party objected to that type of evidence being introduced.

14. The evidence of what the mediator said to each party in the absence of the other is not helpful, and in our view, should not have been admitted into evidence despite the position of both parties that such evidence should be received by the Board. In our opinion, that kind of evidence, besides being hearsay, and given the role of the mediator, not likely

to be “reliable” hearsay evidence, runs contrary to the policy underlying section 111 of the *Labour Relations Act*. The better approach to attempts to introduce this kind of hearsay evidence was set out by the Board in *Shaw Almex Industries Limited*, [1984] OLRB Rep. Jan. 109. We note that in that case, one party objected to the introduction of evidence about what the mediator had said to one party in the absence of the other party. The Board ruled such evidence inadmissible. The Board stated at page 113-117:

“The Board reviewed the scope of subsection (2) of section 111 again in *C C H Canadian Limited*, [1974] OLRB Rep. June 375, where the trade union applicant applied for consent to prosecute the respondent employer for its alleged failure to bargain in good faith. The issue which arose there, and its resolution, are set out in the following passage from the decision in that case:

9. Mr. Cavalluzzo, through his witness Mr. H. Peacock, who was present at most of the negotiation sessions, wanted to adduce evidence of the course of negotiations through both conciliation and mediation. There was a strong implication that this involved the tendering of evidence about what the conciliation officer or mediator said to Mr. Peacock or what he said to the officers and a strict reading of section 100(2) would preclude any evidence of this kind. However, in *Bakery and Confectionary Workers' International Union of America, Local 415 and Gorman Eckert and Company Limited* OLRB M.R. December 1969, p. 1135, the question arose as to whether a proposed collective agreement submitted by one party to the other during conciliation (it was submitted to the conciliation officer) was admissible in evidence. After extensively reviewing the case of *Building Service Employees' International Union, Local 183 and Trenton Memorial Hospital* 64 CLLC 16,302 which gave rise to the enactment of sections 100(2), 100(3), 100(4) and 100(5), the Board ruled that “the purpose of Section 83(2) [now section 100(2)] was intended to protect those conversations of a private nature but that conversations or matters of a non-private nature are not protected by section 83(2) [now section 100(2)]”. Accordingly, the proposed collective agreement presented to the applicant and to the conciliation officer was found to be a non-private nature and properly admissible in evidence.

10. It must be recognized that neither section 14 nor section 100(2) can be read to the exclusion of the other. The Board must attempt to accommodate and integrate the purposes of each of these sections and only where there is an irreconcilable difference between the them should the Board read the more specific wording of section 100(2) as overriding the values of section 14. It is believed that the *Gorman Eckert* decision follows such an admonition. The “private-non-private” distinction breathes meaning into the obligation to bargain in good faith during the conciliation and mediation processes while recognizing the fragile function of the conciliator or mediator - a function of integrity of which depends upon the confidentiality of private communications. This confidentiality was outlined by the Board in *Canadian Stakepole Ltd.* 59 CLLC 18,412 wherein the majority wrote at p. 1778;

Although the extent to which an administrative board may rely on official notice has not been clearly defined, it would be preposterous to suppose that the members of this Board, constituted as it is, can fail to take cognizance of the fact that most successful conciliators have achieved their success by the use of manifold techniques among which are those of conferring separately with each of the parties and of meeting only with key principals and of the further fact that conciliators in this jurisdiction have from time to time relied on each of these last two mentioned methods of breaking down the barriers to the settlement of a dispute. It is common knowledge that skilled conciliators act as a channel of communication between the employer, on the one hand, and a senior official of the trade union, on the other, at time without a single employee even being aware that the conciliator is dealing with either of the “principals”. It would require clear and unequivocal language in the Act to convince us that it was the intention of the Legislature, in enacting the

several provisions of the Act that are included under the heading "Negotiation of Collective Agreements", to lay down that conciliation officers must desist from resorting to such techniques should they in their wisdom in any particular case deem it desirable to do so, except perhaps where the other party to the proceeding consents thereto. Similarly we cannot bring ourselves to believe that the Legislature in enacting the sections referred to, intended to deny to conciliation boards freedom to resort to tested and time-honoured methods of reconciling the parties to an industrial dispute, as they have done so in this jurisdiction time without number in the past.

Accordingly, private communications - communications with the conciliator or mediator when the parties are not in presence of each other - must have the protection of section 100(2). This is so because the mediator or conciliator must be able to discover a party's true "resistance point" [see; *Stevens, Strategy and Collective Bargaining Negotiations* (1963) p. 122 and *Simkin, Mediation* (1973)] and to do so a party must be assured [sic] that the confidentiality of such communications is inviolable. However public statements - statements made while the parties are in each others presence - if admissible in evidence do not undermine the integrity of the conciliator's or mediator's function and hence are not precluded by section 100(2).

11. Applying these principles to the facts at hand, the Board was prepared to permit Mr. Peacock to give his opinion that at the conclusion of the conciliation and mediation processes the parties were little closer to reaching an agreement but the Board was not prepared to allow him to elaborate on this opinion if it entailed the description of communications he had had with the mediator or conciliator while out of the presence of the company's negotiators. Such communications would be clearly of a private nature.

12. Finally, Mr. Cavalluzzo argued that section 100(2) should be analogized to the privilege of solicitor and client. In other words, he suggested that section 100(2) was a privilege of the parties before the Board and therefore could be waived by any one of the parties. The Board rejected this contention. Section 100(2) is intended to protect the integrity of the conciliator's or mediator's office - it is not a privilege of the parties. If one of the parties could waive the application of section 100(2) and reveal the communications between it and a conciliator for instance, the effectiveness of this official could be seriously impaired. He may have tempered the comments received from the parties or made projections that were based on his own informed but personal speculation. Such revelations would only undermine the usefulness of such offices.

The Board's approach to these questions has always recognized that the primary function of a conciliation officer or mediator is not to act as a postman, courier or telegraph service. He is not the agent of either party for the delivery or receipt of messages to and from the other. The officer has no duty to repeat to one party everything he is told by the other. Indeed, as the above-quoted passages demonstrate, he attempts to have the parties disclose to him things that they do not wish disclosed to the opposite party. Each party is aware that this occurs. This adds to the effectiveness of the officer's private communications which are often carefully crafted so as to blur the line between speculation and revelation. Of course, conciliation officers do convey those positions and changes of position which either party wishes conveyed. Even these communications, however, take place within a context of confidential discussion of the nature sought to be protected both by the principles outlined in *Trenton Memorial Hospital* and the express provisions of section 111 of the Act, and are ordinarily inseparable from the context when they occur in the absence of the party from which they originate.

Accordingly, we do not accept the argument that testimony concerning one party's private conversations with a conciliation officer or mediator should be accepted in evidence as prima facie proof of what must have taken place between the mediator or conciliation officer and the opposite party. Apart from the doubtful logic and, in the case of statements by the mediator, the hearsay dangers involved in that approach, its adoption would completely undermine the confidentiality of such private conversations. One party's revelations would force the other party to reveal his version of what he said to the mediator. Both parties, would then

clamour for permission to call the mediator to resolve the inevitable inconsistencies. Even on a question (if relevant) of the party's mental state, any inference that might be drawn from the party's version of his conversations with the mediator is no more trustworthy than his direct statement of what he was thinking at the time, since the other participant in the alleged conversation is not a compellable witness. Reference to the conversation, therefore, adds nothing but further adverse pressure on the confidentiality, and thence the efficacy, of the conciliation process.

We have reviewed the reported decisions in *The Ottawa Journal case*, *supra*. Only one passage suggests that the Board there entertained any evidence of discussions which occurred between a "mediator" and one party in the absence of the other. That appears at paragraph 38 of the Board's first decision at [1977] OLRB Rep. June 309, at p. 318:

38. The parties then met with Ray Illing, a Ministry of Labour mediator. The meetings commenced on April 1st, and continued through the weekend. On Saturday, *The Journal*, through the mediator, presented a proposal in respect of the Joint Council. The proposal dealt with a number of proposals relating to the terms and conditions of employment of the pressmen, stereotypers, and mailers, and also a proposal referring to a "damage and good conduct clause and orderly return to work clause". At the mediator's request, The Journal provided a clarification of this latter matter on the next day. This clarification referred to specified damage to vehicles, property, and newspapers, and the reservation of the right to claim damages resulting from the union boycotts. On that same day, *The Journal* presented, through the mediator, its proposal for the Guild contract. Then, on Tuesday, April 5th, The Journal presented its proposal for the Ottawa Typographical Union contract. These two proposals also contained a proposal concerning damage, good conduct, and orderly return to work. The Unions apparently regarded the first two proposals as being bargainable, but regarded the proposal for the Ottawa Typographical Union as being completely unacceptable, primarily because, in addition to not-giving any concession on jurisdiction, it provided no job guarantees at all.

[emphasis added]

It is not clear how these facts were established in evidence. They might have been agreed facts. If they were, their admission would not have offended the principles established in the Board decisions reviewed in this decision. While we do not know from the *Ottawa Journal* decision how the parties established the facts recited in the passage quoted above, we do know there is no discussion of their admissibility of section 111 of the Act or of the underlying principles reviewed in the Board's previous jurisprudence. Any intended departure from that jurisprudence would, we believe, have been the subject of express comment by the Board. We do not, therefore, take that case as confirming or announcing a policy inconsistent with that jurisprudence.

In the result, we adopt the approach taken by the Board in *CCH Canadian Limited*, *supra*. We will not entertain evidence from either party as to what was discussed between its representative and a conciliator or mediator in the absence of the other party where, as here, the other party objects to the introduction of that evidence. We will give no weight to any evidence of that sort which may have been received up to this point.

Evidence of direct communications between the parties is not, of course, affected by this ruling. That is the answer to any concern that the Board's approach hinders enforcement of the duty to bargain in good faith. The course of negotiations can be charted by evidence of direct communications undertaken from time to time to confirm or obtain confirmation of changes in position. Each party, therefore, has the means to ensure that the confidentiality of the conciliation process is not used as a cloak for bad faith bargaining."

Since neither party objected to the admissibility of that type of evidence, and indeed, both parties sought to rely on statements made by the mediator to each of them in the absence of

the other, it was received by the Board. However, we are inclined to place little weight on that evidence, particularly where the direct evidence of the parties conflicts with the factual assertions contained in what the mediator was alleged to have said to each party in the other's absence.

15. Mr. Harkness did not attend the mediation meeting. Mr. Oliveira advised the company at the meeting that Mr. Harkness could not be in attendance as he had other union business to attend to in Eastern Canada. Mr. Jerry Zeifman and Ms. Stegman were upset at Mr. Harkness's absence. Mr. Zeifman had been available on August 20 and 21. He had re-arranged an important business trip to Europe in order to attend the meeting on August 31. The mediation meeting had not been scheduled earlier because Mr. Harkness had not been available on those dates. The company felt that nothing useful could be accomplished in the absence of Mr. Harkness, although Mr. Oliveira had advised the company that he had authority to settle the contract.

16. The parties met and reviewed all of the provisions in the union's proposals. The company indicated which items it could agree to and which ones it could not accept. The mediator commented to both parties that it had been a useful start and the parties then separated. It was the union's evidence that the company would be preparing a detailed counter offer and there would be further meetings before economic sanctions would be taken. It was the company's evidence that no useful purpose would be served by a further counter offer since there was no indication that the union was prepared to be flexible on any of its proposals, and in particular on the probationary period and union security issues. Mr. Jerry Zeifman and Ms. Stegman were very upset with the lack of progress. Mr. Zeifman testified that he simply advised the mediator that he would consider the company's position and consult with legal counsel. The company expressly denied giving an undertaking to the mediator that it would not resort to economic sanctions until there were further meetings held. It is not disputed that during the face to face meetings between the company and the union, no undertaking was given by the company to prepare another response to the union's position nor was there any undertaking not to resort to economic sanctions until further mediation meetings were held. The mediation meeting ended early in the afternoon.

17. We are satisfied that the company did not give an undertaking not to resort to economic sanctions after August 31, 1984, despite what the union understood to be the situation. No confirmatory telegram was issued by the mediator, as had been done earlier, and furthermore, Mr. Oliveira's notes of the mediation session (see exhibit #38) make no reference to such an undertaking, although the notes do record that the company agreed to prepare a reply to the union's proposals and submit them within two weeks of the mediation meeting.

18. The company negotiating team considered their position over the weekend. Mr. Jerry Zeifman testified that the company felt frustrated, bullied and intimidated by what had occurred. Since the parties were in a legal position to strike or lock-out, the company wanted to control the timing of any work disruption. (Shortly after the union had been certified, the company had noted a marked increase in machinery break-downs, product damage, and much less productivity. As a result, the company's management and office staff worked on the machines during that period in order to maintain production. We note that the union expressly denied any knowledge of a work slow-down or any other improper employee action and there was no evidence before us that the union condoned or had a role in such conduct.) If there was to be a labour dispute, the company would be better able to deal with it if the company

determined when the labour dispute would take place. As well, the company felt that a lock-out was necessary in order to force the union to "get serious" in its bargaining position. The lock-out, it was hoped, would demonstrate to the union that the company was not prepared to agree to all of the union's proposals and required some flexibility from the union.

19. The company therefore decided over the Labour Day weekend to implement a lock-out commencing on Tuesday, September 4, 1984. Since the company also wanted to be able to maintain production, it had to decide whether its management and office staff would work on the machines as before, or use a temporary help agency to supply workers. The company chose to use a temporary help agency to provide it with labour.

20. The company delivered a letter to the union's office on Labour Day, Monday, September 3, 1984. That letter stated:

"September 3, 1984

United Brotherhood of Carpenters and Joiners

290 Lawrence Ave. W.

Toronto, Ontario

M5M 1B3

Attention: Mr. Walter Oliveira,

Business Rep.

Dear Walter:

It is very unfortunate that our bargaining session on Friday August 31, 1984 was not very productive. It is regretful that your full bargaining committee was not present at this very important meeting.

I had requested a meeting with the union for August 21, 1984. This was not possible because Tom Harkness said he would be out of town, however, he gave me his assurance that August 31, would be suitable for him. I had a trip scheduled for Europe for that week which I postponed in order to keep this commitment. I made every effort to accommodate Mr. Harkness and he did not even show up or have the courtesy to call to re-schedule the meeting.

We have been trying very hard to be flexible throughout this process but it seems that you people are not serious about negotiating.

In light of the above and other considerations we will be locking out our employees as of September 4, 1984.

We are however, prepared to meet with you in the future to further negotiate a collective agreement. We trust your intention will be to meet with us and negotiate in a serious and responsible manner.

Yours truly

Jerry Zeifman"

The company also posted a notice to the bargaining unit employees on the door to its premises advising them they had been locked out.

21. When the company commenced the lock-out, an employee who had been in the bargaining unit, but had been promoted to foreman in June of 1984, reported for work as did Martin Kalb, an uncle of the Zeifmans' and Ms. Stegman. Mr. Kalb was an employee in the bargaining unit, but he was permitted to work because he was an uncle of the management of the company. Another employee, Antonio Oliveira, (who is not related to Walter Oliveira) a mechanic, demanded to come to work. The company advised him that bargaining unit employees would not be working until the labour dispute was resolved. Mr. Oliveira then quit his employment with the company. Mr. Oliveira later spoke to his son-in-law who advised him to form a company to do mechanical maintenance work and offer to perform work for the company on a contract basis. Mr. Oliveira was engaged about a week later as a contractor. Mr. Oliveira also began working for persons other than the company, but spent a majority of his working time performing work for the company on a contract basis. A third employee, Ishmael Ali, also asked to work on the day the lock-out started. He was advised that bargaining unit employees would not be permitted to return to work while the labour dispute continued. No other employee in the bargaining unit made a request of the company to return to work.

22. Mr. Walter Oliveira spoke with Mr. Jerry Zeifman on Tuesday September 4th. He was quite surprised by the company's actions and had said to Mr. Zeifman that he thought the company gave an undertaking that there would not be a labour interruption. Mr. Zeifman's response was that the company was exercising its legal rights. No further negotiating meetings were held with the union prior to the first day of hearing in this matter. Mr. Oliveira did request a meeting with the company, and was initially rebuffed because the hearing in this matter was about to start, but subsequently was advised by counsel for the company that the company would meet with the union.

23. The company has maintained production with the labour supplied through a temporary help agency. The company had used temporary help agencies in the past to supply it with labour. Many of the people who began working at the company after the lock-out commenced continued to work at the company throughout the relevant time period.

24. The union submits that the complaint has three distinct but related elements. It submits that the company's conduct prior to the lock-out was unlawful because the company had failed to bargain in good faith contrary to section 15 of the *Labour Relations Act*. The lock-out, it further submits, violated several sections of the Act because the company discriminated between union members and persons who were not union members in conducting the lock-out and additionally, the continued use of replacement employees, who were hired after the lock-out started and worked continuously, was also contrary to the Act because that demonstrated the company's desire not to reach a collective agreement and to operate its business without the union.

25. The company does not dispute the union's characterization of the issues, but submits that there are only two, not three elements to the complaint, the conduct of the parties before the lock-out, and the implementation of the lock-out and operation of the company during the lock-out. Counsel for the company agrees with counsel for the union in asserting that the conduct is related.

26. While it may be helpful to examine independently the various events which occurred and the conduct of the parties during the relevant times, the Board should not focus on each element separately since we are examining, in this complaint, the bargaining process that the parties have followed. One cannot properly analyze the lock-out without considering what had taken place prior to the lock-out, nor can one assess the legality of the bargaining positions of the company without also considering the entire context in which the company's positions developed.

27. Counsel for the union submitted that notwithstanding the timeliness of the lock-out, a lock-out is illegal if it is motivated for reasons that are prohibited by the *Labour Relations Act*. Counsel for the employer did not disagree with that proposition. Section 1(1)(k) of the *Labour Relations Act* defines lock-out as follows:

"1.-(1) In this Act,

- (k) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, ... to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, ... the trade union, or the employees."

28. We are satisfied that if a lock-out is imposed by an employer "with a view to compel or induce his employees to refrain from exercising any rights ... under this Act", it is illegal even if it is otherwise timely. (See *Irving Oil Ltd.*, 80 CLLC 14,054 (N.B.C.A.).) The Board stated in *Westroc Industries Limited*, [1981] OLRB Rep. March 381 at 392:

"... a lock-out aimed at dissuading employees from exercising rights under the Act is never lawful and the concept of timeliness simply has no application to such activity."

[emphasis added]

That aim need not be the sole, principal, or predominant one of the lock-out. It is sufficient to establish that a lock-out is unlawful, regardless of timeliness, if unlawful intent forms even a part of the motivation for the lock-out. (See *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577 at 600-605, and in particular paragraphs 54-56.) It is clear, therefore, that a determination of whether the lock-out was lawful in this case must rest on our assessment of the company's motive for imposing the lock-out. That assessment, as we said earlier, cannot be carried out in isolation. Regard must be had to all of the conduct of both parties, both before and during the lock-out to ascertain whether the company had an illegal purpose in doing what it did.

29. Motivation is also a very relevant consideration in determining, in this case, whether the company violated section 15 of the Act. Section 15 of the Act requires, after notice to bargain has been served, the parties to "... bargain in good faith and make every reasonable effort to make a collective agreement". There are two principal components of the duty imposed by section 15 of the Act. These were described by the Board in *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49 at 63:

"... it is our belief that the duty described in section 14 [now 15] has at least two principle [sic] functions. The duty reinforces the obligation of an employer to recognize the bargaining

agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict."

30. The evidence in this case does not suggest that the company either failed to engage in discussions with the union or refused to recognize the union. The company met with the union, provided the information requested by the union to it, and discussed both the union's proposals and its proposals during their meetings.

31. It is, however, the union's submission that the company engaged in surface bargaining, by making proposals which were designed to avoid a collective agreement. An allegation of "surface bargaining" requires the Board to examine the content of the bargaining rather than just the process. The degree of scrutiny that the Board uses when examining the content of bargaining is dictated by the purpose of section 15 and the Board's interpretation of its role in assessing whether a party's conduct is contrary to section 15 of the Act.

32. The Board in *DeVilbiss (Canada) Ltd.*, *supra*, discussed the basic principles applicable in reviewing the bargaining conduct of parties at page 61 of that decision:

"... The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective - that of entering into a collective agreement and section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, *the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.*"

[emphasis added]

Those principles were further articulated in *Fashion Craft Kitchens*, [1979] OLRB Rep. Oct. 967 at 970-71:

"Section 14 [now 15] of *The Labour Relations Act* requires the parties to meet, to bargain in good faith and to make every reasonable effort to make a collective agreement. The section does not contemplate that the parties must nor that they necessarily shall conclude a collective agreement. The Act is predicated on a realization that a trade union and an employer come to the bargaining table with divergent objectives, each party seeking to maximize its own self-interest. Collective bargaining under the scheme of the Act is grounded in voluntarism, and the trade-offs and compromises which parties are prepared to make are matters to be determined within their own judgment. As long as they negotiate within the law the collective agreement which they ultimately reach, or whether they conclude any collective agreement at all, must ultimately depend upon the ability and economic power which they can bring to bear in bargaining.

While the parties have great latitude to advance their own position and force its acceptance upon their opposite number, they may not lawfully base their conduct on a deliberate intention to see that no collective agreement will be concluded. They must, by virtue of section 14 [now 15] of *The Labour Relations Act*, have as a common objective the making of a collective agreement: any contrary intention is in breach of the duty to bargain in good faith and make every reasonable attempt to conclude a collective agreement. (*DeVilbiss (Canada) Ltd.* [1976] OLRB Rep. Mar. 49). However a deliberate intention to frustrate bargaining is not always necessary to establish a breach of section 14 [now 15] of the Act. There are two parts to the section. Firstly there is the duty to meet and bargain in good faith - a requirement that takes account of the parties' motives and intentions. Secondly there is the requirement to make every reasonable effort to make a collective agreement."

33. The Board also recognized that the content of bargaining is a matter which is and should be principally left to the parties when it wrote in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at 1242-44:

"The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has as overwhelming strength at that bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See *York Regional Board of Health* (1978), 18 L.A.C. (2d) 255 at 263 (Adams).

Thus, from an employee viewpoint the right to engage in collective bargaining is not a right to achieve the terms of employment employees may wish. It is simply an opportunity to combine together to try and achieve their needs with the possibility that economic realities will dictate quite a different result in any particular situation. This perspective of the bargaining duty was explained by the Board in *CCH Canadian Limited* [1974] OLRB Rep. June 375 at page 381 in the following way:

'There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith. (see *Regina ex. rel. Hearn v. Norfolk General Hospital* (1957) 119 C.C.C. 290 (Ont. Mag. Ct.)). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self-interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application.'

Of course, difficulties may arise in trying to distinguish those actions of an employer that are properly characterized as 'hard bargaining' from conduct designed to destroy the union. And first contract bargaining presents the Board with no greater challenge in this respect.

In order to make necessary but sensitive assessments of bargaining conduct the Board must assess the totality of a collective bargaining relationship. For example, the occurrence of flagrant employer unfair labour practices at the same time the parties are engaged

in collective bargaining may belie an employer's claim that a negotiating position is merely hard bargaining with a trade union unwilling to accept its lack of negotiating 'clout'. Or patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer's desire to embarrass the union and encourage its abandonment by the employees. The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of. On the other hand, this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement - a commitment which is more and more self-evident as parties proceed together beyond their first collective bargaining agreement. Too penetrating a review by this Board will only insert it as a third party in the bargaining arena to be tactically used by the negotiators, diverting their attention from the principal task at hand. This is the sense of the note of caution registered by the British Columbia Labour Relations Board in its touchstone *Noranda* case, *supra* at page 160:

'Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:

'There is also danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.'

Accordingly, while we interpret s. 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.'"

34. Surface bargaining, or bargaining without any intention of entering into a collective agreement was described by the Board in *The Daily Times*, [1978] OLRB Rep. July 604 at 610:

"'Surface bargaining', is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between 'surface bargaining' and hard bargaining. The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. *Consequently, the mere tendering of a proposal which is unacceptable or even 'predictably unacceptable' is not sufficient, standing alone, to allow the Board to draw an inference of 'surface bargaining'. This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations.* It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of 'surface' bargaining can be made."

[emphasis added]

The Board made it clear in *The Daily Times* case that it will be circumspect in finding surface bargaining based *solely* on the positions taken at the bargaining table. In *T. Eaton Co. Limited*,

[1985] OLRB Rep. March 491, the Board dealt with an allegation of surface bargaining in the following way at paragraph 42:

“These contentions raise the important issue of whether the company is seeking through surface bargaining to frustrate the bargaining process, or whether it is simply engaging in hard bargaining. While we have no doubt that the company would rather not have to deal with the union, on the evidence there is no question in our mind but that the company is in fact prepared to sign collective agreements with the union. The company is seeking, however, to ensure that any such collective agreements contain terms favourable to the company, terms which will retain for management most of the flexibility it currently enjoys and which will not result in any increase in operating costs. The fact that the company has not made any major concessions in bargaining relates directly to the type of agreement management is seeking to negotiate. Section 15 does not, however, preclude a party from taking a firm position in bargaining. This point is made clear in the following excerpt from *The Daily Times* case, [1978] OLRB Rep. July 604, where the Board noted:

The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses.

In the instant case, the company has taken firm positions in an attempt to secure favourable collective agreement terms. The mere fact that it has refused to make concessions acceptable to the union, does not, in our view, result in a conclusion that it is in violation of section 15 of the Act.”

35. The Board, in assessing whether bargaining is hard bargaining or surface bargaining, cannot create its own standard of what a fair, just, or good collective agreement between the parties should say and then decide whether a party has engaged in hard bargaining or surface bargaining by assessing how far that party's position is from the Board's standard. The Board's approach to reviewing the content of bargaining must recognize that collective bargaining, within the legal framework of the *Labour Relations Act*, involves the exercise of power. We believe that the description of the collective bargaining process and the Board's approach to it set out by the Board in *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356 at 1364 is apt:

“One cannot quarrel with the proposition that the ‘duty to bargain in good faith’ must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. *However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision-making as the normative standard for the collective bargaining process.* Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development from given and accepted premises. It is a process in which reason plays a part - but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a ‘claim of right’ from a ‘naked demand’. Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a ‘fair’ settlement, or a just allocation of rewards to capital and labour.

Rational discussion is an important aspect of the bargaining process. So is power. Persuasion is an effective tactic to gain one's bargaining objectives. So is economic pressure. Whether that system actually results in a 'just wage' or 'distributive justice', we leave for other to debate. Collective bargaining permits that outcome, but it does not compel it."

[Emphasis added]

(See also *Fotomat Canada Ltd.*, [1980] OLRB Rep. Oct. 1397 at 1421; *Goldcraft Printers Ltd.*, [1980] OLRB Rep. Apr. 448 at 455-57; *Cross Tube Products Inc.*, [1980] OLRB Rep. May 669.)

36. In this case, the union made it clear to the company, as early as the third meeting, that it wanted the company to accept the majority of the terms and conditions contained in the Canadian Woodwork Manufacturers Association collective agreement. The union applied for conciliation after the third meeting. The company indicated to the union that it thought conciliation was premature. The union asked for the conciliation officer to release the no-board report at the conclusion of the first and only meeting with the conciliation officer. The company indicated to the union that the no-board report was premature at that stage. We are satisfied that the union advised the company, both prior to and at the conciliation stage of bargaining, that it was inflexible in a number of areas, including probationary period, hours of work, vacation pay, statutory holidays, handling of grievances, and union security and explained the reason for that inflexibility. The company was simply not prepared to accept the union's position. It countered with its own positions on those areas in dispute, and explained to the union the reasons for its positions. The union was not prepared to accept the company's positions. At the conclusion of the mediation meeting, the parties were in a legal position to engage in economic sanctions, and the company chose to do so. We find that the company was upset and frustrated at what had taken place in bargaining up to that time. We are also satisfied that the company was concerned about the timing of any disruption to its operations and wanted to be the one to choose when such a disruption would occur. The evidence of Mr. Jerry Zeifman and Ms. Stegman was that the company was genuinely concerned that even if the employees did not walk off the job, there was a real danger that the employees would engage in a production slow down and that increases in machine breakdown and product damage might occur.

37. The union submitted that the company's refusal to accept the union's demand for a compulsory membership union security clause was evidence of bargaining in bad faith because the company did not provide a business justification for its refusal. The company was prepared to agree to a union security clause requiring it to deduct and remit union dues and initiation fees from all employees in the bargaining unit.

38. Mr. Jerry Zeifman candidly testified in cross-examination that he had no business justification for refusing the union's demand for a compulsory membership form of union security. He said that it was a matter of principle with him. He felt that any person, including employees, should be free to join or not join groups without coercion. We would observe that union security in the form of compulsory union membership was not the central issue in dispute at the conciliation and mediation stage of the bargaining, but was one of several items that were unresolved. Indeed, in examination-in-chief, Mr. Harkness listed the principal issues in dispute, and union security was not initially on that list, but became part of that list only after further questioning from his counsel.

39. Counsel for the union relied on the decision of the Canada Labour Relations Board in *Austin Airways Ltd.* (1984), 4 Can. L.R.B.R. (NS) 343 for the proposition that an employer's refusal to accept a union's demand on union security in the absence of business justification is contrary to the *Labour Relations Act*. In that case, Austin Airways had previously entered into a collective agreement which contained a compulsory dues deduction clause. During the second round of negotiations, it was attempting to change that clause to a voluntary check-off clause. The Canada Labour Relations Board at page 354-55 of the decision wrote:

"In the absence of minimum standards of union security in the Code and, if one starts from the assumption that everything contained in a collective agreement is negotiable, what is there then in this case that could cause Austin's conduct to be considered to have crossed that almost undefinable line into the realm of bad faith bargaining? The answer lies in the total absence of justifiable business reasons for its present stance.

Throughout the proceedings the employer showed no negative effects on its business considerations should the previous provisions of art. 20 requiring it to deduct and remit dues to the union be continued. It conceded that there had been no adverse effects during the two year term of the previous agreement and there was no evidence of employee complaint or discontent with the automatic check off provisions. In fact, Mr. Deluce admitted that Austin's stance was purely a matter of principle and a belief of the officers of Austin that dues deductions be voluntary.

Austin denied that its conduct was responsible for the strike. It implied that its compromise position on August 30, 1983 proved its flexibility on the question of union dues deduction and remittance. It reminded the Board that it was CALEA that had called the strike on that single issue after maintaining a rigid posture throughout. It is rather obvious though, from the contents of the employer's bulletin to the employees on August 11, 1983, some eleven days before the strike that it intended to push the union into the position where it had to accept voluntary deduction or strike. Just as obvious, the employer was prepared to take a strike on that issue.

In such circumstances a trade union is in a 'Catch 22' position. To agree to 'authorized' voluntary dues deduction requires union members to make an open declaration of union loyalty to their employer, not only once, but on every occasion a new contract is negotiated. That can dissuade employees from supporting the union and could eventually lead to the erosion of its membership in the bargaining unit. It also provides the employer with an ongoing gauge of the union's strength. To resist the concept of voluntary dues deduction a union's only option is to resort to economic sanctions as CALEA did in this case. Either way the union's membership is exposed.

Where an employer deliberately manipulates such an impasse, as we are convinced that Austin did, it must should a heavy onus to support its actions with plausible and justifiable business reasons.

In this case, taking into account all of the circumstances and, in the absence of any, let alone justifiable business reasons for its conduct, the Board can only conclude that Austin was continuing its resistance to the presence of CALEA as a carry over from the first round of negotiations when it had to, in Mr. Deluce's own words, 'concede the issue under duress'. The employer was obviously engaging in predetermined tactics designed to undermine the union and divide the employees. By so doing it interfered with the union's exclusive representation of the employees in the bargaining unit."

40. The situation described in the *Austin Airways* case is not analogous to the matter that is before us. The company's refusal to agree to the union's proposal, and the company's

proposal, would not disclose membership support for the union, nor would it “undermine the union or divide the employees”. The Board in *The Daily Times* case, *supra*, dismissed a complaint alleging a violation of section 15, in which a major element of the complaint was the company’s insistence on a voluntary revocable check-off while the union was demanding compulsory membership. The Board in that case stated page 610:

“Section 36(a) of the Act provides that on written request of the trade union there shall be included in the collective agreement a clause providing for voluntary revocable check-off. An offer of the form of union security provided for in Section 36(a) of the Act cannot be in violation of the Act.”

Section 43 of the Act, which provides for compulsory dues deduction was introduced into the Act in 1980 and replaced section 36. We note that the company’s preparedness to agree to a clause permitting the deduction of initiation fees as well as regular monthly union dues is more than the minimum required by section 43 of the Act.

41. The absence of business justification may cause the Board to make an inferential finding that an employer’s position on any particular issue, including union security, is *intended* to undermine the union or ensure that no collective agreement will be reached. (See *Canada Trustco Mortgage Company*, *supra*, at 1364 where the Board stated:

“... an employer’s position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether.”)

However, a candid and credible explanation for refusing to agree to a compulsory membership form of union security because it is a matter of individual principle does not give rise to a finding of bargaining in bad faith in this case. We accept Mr. Zeifman’s explanation and find that his position on that issue was not intended to either undermine the union or avoid a collective agreement. Furthermore, we are satisfied that the union security clause at issue in this case was neither the only, nor even the principal issue remaining in dispute.

42. The company’s decision to attempt to operate its business by hiring temporary replacements to work during the lock-out, if not improperly motivated, is permitted by the *Labour Relations Act*, subject, of course, to section 71a of the Act. (See *Westroc Industries Limited*, [1981] OLRB Rep. March 381 at 395.) There is no allegation in this case that the company retained the services of a professional strike breaker or that any person connected with this dispute acted as a professional strike breaker. The union submitted that the persons working for the company were actually the company’s employees and not the employees of the temporary help agency. It is unnecessary for us to resolve that issue. We are prepared to assume that the persons supplied to the company by the temporary help agency were employees of the company. However, we are satisfied that they were hired as temporary employees. That was the direct evidence of the company, unshaken on cross-examination, and not contradicted by any other evidence. The mere fact that an employee who is hired on a temporary basis continues to work for more than a short period of time does not mean that the employee is permanently employed. More importantly, the fact that such an employee is working at a job that comes within the bargaining unit cannot be used by the employer as a reason to refuse to permit a locked-out employee, who has abandoned the economic conflict, to return to his former job. See *Westroc Industries*, *supra*, where the Board stated paragraph 27:

“Lastly, regardless of the outcome of these negotiations, we are satisfied that individual

employees locked out and replaced by temporary employees continue to have important job security rights under the general unfair labour practice provisions of the statute. After the imposition of a lockout for some considerable duration and without a collective agreement materializing, affected employees may wish to abandon the conflict and return to work despite the apparent continuing resistance of the bargaining agent. The employer's response to such a situation would be closely scrutinized under section 58, *inter alia*, of the Act."

43. We are concerned about two aspects of the company's conduct during the lock-out. Mr. Kalb, an uncle of the Zeifmans and Ms. Stegman and a bargaining unit employee, was permitted to work during the lock-out. For the purposes of this decision, we are prepared to assume that Mr. Kalb was opposed to the union and that the majority of the other employees in the bargaining unit supported it. However, we are satisfied that the company was not discriminating between Mr. Kalb and the other employees represented by the union by reason of union membership or the exercise of rights under the Act by those employees and that the only reason Mr. Kalb was permitted to continue working for the company during the lock-out was due to his being an uncle of the company's management. We are also concerned about the company's refusal to permit Mr. Ali to work after the lock-out started while shortly thereafter engaging Mr. Oliveira to perform work for it on a contract basis. There was no evidence to suggest that the refusal to permit Mr. Ali to work was based in whole or in part on Mr. Ali's union affiliation, if any, or the exercise by him of rights under the *Labour Relations Act*. The company's refusal to permit him to work was understandable since the lock-out had just started. This was not comparable to the situation described in *Westroc, supra*, where the Board indicated it would "closely scrutinize" an employer's refusal to permit an employee who had been locked-out for a considerable period of time and who wished to abandon the economic conflict to return to work.

44. The evidence established that Mr. Oliveira did actually resign from his employment with the company. The idea of Mr. Oliveira forming his own company and offering to perform work for the respondent company on a contract basis came from his son-in-law, not from anyone connected with the company's management. The company's management did not initiate the arrangement with Mr. Oliveira but simply entered into the contracting arrangement with him after he had ended his employment relationship with the company. Mr. Oliveira's quitting of employment was not conditional on the contracting arrangement being agreed to by the company.

45. The company did not, by permitting Mr. Kalb to continue working and by entering into the contracting arrangement with Mr. Oliveira initiate a selective lock-out among its employees represented by the union prior to the commencement of the lock-out. We find that the company did not have any discriminatory intent by contracting with Mr. Oliveira to perform work for the company during the lock-out. In our opinion, the contracting arrangement with Mr. Oliveira did not violate the Act because in addition to the absence of discriminatory intent, Mr. Oliveira's resignation from his employment was unconditional and was not suggested or instigated by the company and further the company played no part whatever in initiating the contracting arrangement with Mr. Oliveira but simply agreed to enter into that relationship after Mr. Oliveira had quit his employment with the company.

46. Furthermore, there was no evidence that any other employee in the bargaining unit sought to abandon the economic conflict and return to his or her former job in the bargaining unit. If that had been the case, the Board, in applying the principles enunciated earlier by the

Board in the *Westroc Industries Limited* case, would have required the company to affirmatively establish that the refusal to permit an employee who had been locked out to return to work had nothing whatever to do with the fact that another person, hired after the lock-out commenced, was doing that employee's job and also had nothing to do with the locked out employee's exercise of rights under the *Labour Relations Act*. (See section 89(5) of the Act). We are satisfied that similar rights afforded to employees on strike by section 73 of the Act exist in relation to employees that have been locked-out by virtue of sections 66 and 70 of the Act, with the added protection that, more than six months after the lock-out commenced, a locked-out employee can displace an employee hired to do the work of the locked-out employee. This is not to say that an employer can lock-out employees and then suggest that some or all of them return to work by attempting to bargain with the employees directly. The employees' bargaining agent continues to hold bargaining rights for the employees in the bargaining unit and any attempt by their employer to circumvent the employees' bargaining agent in order to bargain with employees directly might well violate sections 64 and 67 of the Act.

47. Counsel for the union asked the Board carefully examine the conduct of the company in this case. He refers us to the following statement in the *Westroc Industries Limited*, *supra* at 395:

"As the definition of lockout reveals, this labour relations concept involves employer conduct that may be based on a proper or improper purpose. Which purpose is in fact the case must be determined on a careful review of all the evidence. In many earlier decisions we have said that first agreement situations are to be subjected to detailed scrutiny by this Board and a lockout with replacements will particularly merit such an approach in a first agreement context."

We subscribe to the approach enunciated by the Board in that case. We have subjected the conduct of the company to detailed scrutiny in this case. In our view, the company bargained with the union in an attempt to reach an agreement satisfactory to it. It was troubled by the union's bargaining posture which it viewed as intransigent and was concerned about not being in control of the timing of a work disruption. The company met with the union. It discussed its proposals and the reasons for them and listened to the union's arguments. It asked the union to postpone conciliation and made it clear to the union that it thought that the no-board report was premature. The union's stance in bargaining was aggressive. It moved to the conciliation and the no-board stage of bargaining to get the company to move off its position. We are satisfied that the company, when it locked out its bargaining unit employees, attempted to do to the union what the union was trying to do to the company. The union did not expect that to happen. While the lock-out was unexpected, it was not, in our view, illegal.

48. While it is unfortunate that the negotiations between the parties in this matter broke down, the collective bargaining system under the *Labour Relations Act* gives the parties to collective bargaining negotiations the freedom to choose whether to agree on the terms of a collective agreement or face the consequences of a strike or lock-out. Economic sanctions can be invoked by either an employer or a trade union under the *Labour Relations Act* in a timely fashion to achieve their legal goals in collective bargaining. We are not persuaded that the company failed to bargain in good faith and make every reasonable effort to reach a collective agreement and we are satisfied that the company's only motivation for imposing the lock-out and using temporary employees to continue operations was to force the union to modify its proposals so that a collective agreement, acceptable to the company, would be reached.

49. For these reasons, this complaint is hereby dismissed.

1061-84-R Ottawa Newspaper Guild, Local 205 of The Newspaper Guild, Applicant,
v. **The Citizen**, a division of Southam, Inc., Respondent

Dependent Contractor - Employee - Whether drivers delivering newspapers to distribution routes dependent contractors - Board applying indicia on a "best case" basis - Finding dependent contractor status not made out

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *F. W. Murray and W. F. Rutherford*.

APPEARANCES: *Denis J. Power, Tony Cote, Dave Elder and Frederica Wilson* for the applicant; *Michael Hines, Ted Allen and Harold Lundy* for the respondent.

DECISION OF THE BOARD; June 6, 1985

1. By decision of the Board (differently constituted) dated August 13, 1984, a Board Officer was appointed to inquire into the list and composition of the bargaining unit. The Officer met with the parties at the premises of the respondent in Ottawa. Representing the applicant were Denis Power, Wendy Jackson and David Elder; for the respondent, Michael Hines, Ted Allen, Phil Wong, Armand Auclair and Harold Lundy. The parties agreed on a statement of facts and on the examination of one witness, Rene Charlebois. The parties were afforded full opportunity to be heard, to examine and cross-examine the witness and to introduce evidence. The parties were also afforded an opportunity to call additional witnesses or evidence but declined to do so.

2. The Board heard the representations of the parties with respect to the Board Officer's report. The parties agreed that the Board should consider the testimony of the witness, in the context of the agreed statement of facts, on a "best case" basis for the applicant. That is, if the Board found that the applicant's "best" case did not establish that the individuals in respect of whom the applicant sought bargaining rights were dependent contractors, the application would be dismissed. However, if the Board found for the applicant on the "best" case basis the parties would attempt to resolve the classification of individuals as in or out of the bargaining unit. Failing that agreement, of course, the appointment of a Board Officer to examine additional drivers would be necessary.

3. The parties agreed that, for the purposes of this "best" case assessment, the evidence of the witness should be accepted as credible. The respondent, though, reserved the right to challenge the credibility of this particular witness by leading evidence if so desired,

apart from the “best” case evaluation. Further, even if the parties were able to sort out the exclusions from and inclusions in the bargaining unit sought by the applicant, the respondent reserved its right to argue that the bargaining unit was not appropriate given the applicant’s admission that there would be independent contractors, dependent contractors and employees of independent contractors delivering papers for the respondent.

4. While both parties touched on this latter issue and referred to *Vancouver Printing Specialities and Paper Products Union, Local 598, and Pacific Press Limited* (1974) Can. LRBR 193 (B.C.), the Board is not here responding to that matter. That is, the issue before the Board at this stage of this matter is a determination of whether, on the applicant’s best case, the individuals for whom the applicant seeks bargaining rights are dependent contractors or independent contractors.

5. It is appropriate to here set out the agreed statement of facts:

The Ottawa Citizen publishes a newspaper which is distributed both within the City of Ottawa and throughout Eastern Ontario and Western Quebec. The paper is printed and distributed in the manner described below, six days a week, 52 weeks a year.

The Citizen has approximately 700 regular employees. Of these 125 are represented by the International Typographical Union, 85 are represented by the Newspaper Printing and Graphic Communications Union. Of the rest 300 are represented by the Ottawa Newspaper Guild in two bargaining units. The first unit representing the 294 employees, that is 43% of all Citizen Employees, in the news, circulation, business, maintenance and printing departments. The second unit represents the six employees, that is .9% of all Citizen Employees employed as fleet mechanics and fleet service persons.

The Citizen published two “editions”, a morning and an afternoon edition. In fact there are two “morning editions”, one which is distributed to the areas outside Ottawa and the second which is distributed in Ottawa. The “country morning edition” is printed first so that it can be distributed first in order to reach its destinations (for example Deep River) by morning. The first copies are scheduled to be ready to leave the Citizen between 2:00 and 1:30 a.m. each morning. The first copies of the “city morning edition” are scheduled to be ready to leave the Citizen between 4:00 and 4:30 a.m. each morning. However, frequently production failures result in delays. The afternoon edition is only distributed by home delivery to subscribers in Ottawa and is ready for distribution at approximately 12:00 noon.

The Citizen is distributed by truck. The morning editions, both city and country, are distributed by approximately 44 trucks. The Citizen takes the position that all of the drivers of these trucks are either independent contractors or employees of independent contractors. The Guild agrees that some of the drivers are independent contractors or employees of independent contractors but takes the position that about 24 of the drivers

(18 city and 6 country) are dependent contractors as that expression is defined in the Labour Relations Act. The parties agree that many of the drivers with whom we are concerned have been working for or with the Ottawa Citizen, as the case may be, for a number of years. The afternoon edition is distributed to drop off points by district supervisors who are employees of the Citizen. The status of these individuals is not in issue.

Armand Auclair is the single copy sales manager (city) and is responsible for the distribution of the morning edition in the city. Harold Lundy is the country circulation manager and is responsible for the distribution of the morning edition in the country. Both are Citizen employees.

The drivers whose status is in question deliver the morning papers according to routes which they have taken on. Drivers do the same route each day. There are 31 city routes and 15 country routes. The Citizen does not have a contract with each and every driver. Rather, in some cases an individual is responsible for more than one route. That individual may drive one route himself and hire other drivers to drive the other(s). One driver who the union agrees is an independent contractor does not drive any route and simply hires drivers to drive the two routes for which he is responsible.

For clarification, the union is not claiming as employees those people who drive for independent contractors and indeed these people do not show up on the Respondent's list. The union's position is that the persons on the schedules are dependent contractors rather than independent contractors. The union is not asserting that these people are employees except if they are dependent contractors.

Of the 46 routes four individuals are responsible for three routes each and five individuals are responsible for two routes each. The remaining 24 routes are each allocated to a different individual. As stated, routes are not "assigned" on a daily basis. A driver agrees at the outset of his relationship with the Citizen to drive (or be responsible for) a particular route or routes on a regular basis.

There are no written contracts with any of the morning drivers. The Citizen pays a flat rate for each route. The rates are calculated according to a formula which involves such factors as the number of papers delivered, the distance travelled, the time taken and the size of the truck driven. Management's view of the value of each route is based upon the formula. However the final rate is arrived at by negotiation on an individual basis with the driver in question.

The drivers pick up bundles of newspapers at the Citizen building in West Ottawa. The trucks are loaded in a particular order. The Citizen determines this order according to its delivery considerations (e.g. trucks going further are loaded first). The drivers are expected to be at the loading ramp in time to receive their papers in order. No particular

starting time is specified although they are required to be on site by 3:00 a.m. (country drivers) or 4:30 a.m. (city drivers) at the latest. Their trucks are loaded by conveyor belt. The drivers then drive their trucks to the drop off points on their route. At the drop off point they may be required to place the papers in a newspaper box on a sidewalk or at the entrance or inside buildings where stores which sell the papers are located, or, in the case of country drivers, they may simply be required to leave them on a street corner for carriers to pick up and deliver. The drivers do not handle money nor do they have any contact with the Citizen's customers.

Each route has an associated "manifest". This is a document setting out the locations of the route's drop off points and the number of papers to be dropped off each day. The manifest lists the drop off points in an order the Citizen believes most efficient. However, drivers are free to and do adopt other routes if they believe them to be most cost-efficient, quicker, etc. The Citizen does not require drivers to inform it of changes. Changes to the manifest are made by the Citizen at the request of the drivers. The Citizen is only concerned that the proper number of papers get delivered at the appointed locations within a period of time appropriate to the route in question. The Citizen only vetoes a change in the route if the change has resulted in a customer complaint. The Citizen does not train the drivers in any way.

City drivers are paid for "waiting time" if the city edition press is late by more than an hour. This arrangement was negotiated between the city route drivers and Armand Auclair at the initiation of the city drivers. Country drivers have not asked for and do not receive waiting time. Apart from the payment of waiting time to city drivers, the Citizen has no financial involvement with the drivers other than paying them the flat rate pertaining to the route(s) for which they are responsible. In particular, the trucks are neither owned nor financed in any way by the Citizen. They are owned, rented or borrowed by the drivers themselves. In the cases of individuals responsible for more than one route, those individuals own or otherwise obtain the use of all the trucks used. The Citizen does not specify the type of truck to be used other than to ensure it can carry the load and that it is covered. The Citizen does not deduct U.I.C., C.P.P., W.C.B. or income tax from the flat rate. It treats the flat rate paid as an expense for doing business for its own tax purposes. It does not issue T.D. 4's [sic] or any other tax statements in respect of the flat rates paid to the drivers; no benefits are paid to the drivers.

All expenses related to delivering the papers are borne by the drivers themselves. This includes gas, insurance, maintenance, licence fees and parking tickets (except for a few tickets received by different drivers which had been caused by press delays; this was at the driver's request which was initially refused and subsequently agreed to). The Citizen does not require or monitor insurance levels, maintenance of vehicles etc. The trucks used are not painted with Citizen logos or colours. Some drivers

requested and were given Citizen window cards to avoid getting parking tickets. Drivers are not required to carry these window cards.

Subject to the exceptions noted below, the drivers deliver the papers six days a week, 52 weeks a year. The Citizen does not require any of the drivers to personally deliver the papers for which they are responsible. As stated, a number of individuals hire their own drivers to deliver papers along several routes for which they are responsible. In fact, almost all the drivers do drive the route (or one of the routes) for which they have accepted responsibility. One or two drivers drive double routes. Even those drivers who are responsible for only one route do not have to deliver the papers themselves so long as the papers are delivered. When drivers are sick or wish to take holiday they are responsible for ensuring the route is "covered" by someone else. In fact, about half of the drivers in question are away on holiday for one or two weeks a year. Some drivers take no holidays. The Citizen is not responsible for providing "coverage" in the absence of the driver in question. The drivers do not have to inform the Citizen as to when and why they will be away and do not have to inform or obtain the Citizen's consent regarding the substitute they have chosen. In an emergency if a driver advises the Citizen that he has been unable to arrange coverage, the Citizen will hire someone to deliver the papers; the non-attending driver will suffer a deduction to reflect the fact he did not drive the route. Some drivers pay others to do part of their route on a regular basis. The Citizen is not a party to these arrangements and does not pay the substitutes. So long as the papers are delivered the Citizen pays the person who has taken responsibility for the route. Whatever he pays the substitute, if anything, is between the two of them. In addition, two of the drivers make use of helpers who regularly travel with them on their routes.

The time required to drive the city routes varies between one and two and one half hours but averages approximately two hours. In addition, the drivers spend from one to one and a half hours at the Citizen awaiting loading or during the course of loading on days when there is no delay in the production of the paper. The lengths of time referred to above does not include time spent driving to the Citizen building at the start of the day. Payment is made twice per month. The average gross amount paid bi-monthly to the drivers is \$425.00.

The time taken to complete country runs is in issue. It varies between two and a half and seven, or in the union's view, ten hours, but averages six hours per run. This time is "round trip"; that is, it is the length of time between the time the driver leaves his house (which in most cases is in the country) and the time he returns home after dropping off his papers. The average bi-monthly amount paid to the country drivers whose status is in dispute is \$1,520.

Expenses vary. One driver was known to spend 50% of his pay on expenses.

The Citizen does not restrict the drivers in obtaining other work if they are so inclined once they are finished their routes. Of the 33 persons responsible for the 46 routes a number run cartage companies and hire employees of their own. The union agrees these are independent contractors. Of the drivers whose status is in dispute, one runs a tuck/convenience shop in an apartment, a number work as full-time employees (e.g. caretaker, milkman etc.) with employers other than the Citizen; one delivers "shorts" for the Citizen and two work as part-time ramp employees for the Citizen as members of the large Guild bargaining unit. Of the rest there is some dispute as to what if any other income they earn beyond monies received from the Citizen. Three or four drivers transport papers published by a competitor of the Citizen once each week. Except in the case of the driver who delivers shorts and the two part-timers, the Citizen is not involved in the other employment drivers may have.

When a driver gives up a run it is sometimes picked up by one of the people who substituted for the departing driver in the past. Occasionally, a driver will simply announce he is leaving and that a "new face" will be taking over for him. The Citizen never requests references or otherwise investigates the prospective replacement in any way, and only asks if he has the proper vehicle and licence. The prospective drivers do not complete application forms. The names of prospective new drivers are simply put on a waiting list.

The Citizen has no personnel files relating to any of the drivers in question. There is a file containing information relating to the payment of drivers. No discipline is ever imposed upon drivers; they are not fined, suspended or given formal warnings kept on file. When they are late for pickup or have delivered late this might be brought to their attention and they may be told to correct the situation. None of the rules and regulations applicable to Citizen employees (e.g. that they not work for a competitor) are applied to the drivers. In particular the rules applicable to employees driving vehicles owned by the Citizen (e.g. no passengers, report accidents) are not applied to the drivers.

As regards its employees (such as its district supervisors who distribute afternoon papers) the Citizen receives completed application forms or resumes, and makes enquiries or is otherwise familiar with the applicants prior to hiring. It conducts medical examinations upon hiring and trains its new hires. It maintains a separate personnel file in respect of each employee.

A Citizen's district supervisor drives trucks owned/insured and maintained by the Citizen painted with the Citizen logos and colours when they distribute the afternoon edition. The district supervisors do not select the route they want to drive. Rather, they are assigned routes by the city home delivery managers. The precise route stop by stop is set out for

them and any changes are monitored and subject to approval. The district supervisors are covered by the Guild agreement and are paid bi-weekly salary plus applicable differentials and are subject to statutory deductions. Their vacation schedules are subject to approval by the Citizen. When they are sick they are required to phone in. The Citizen then looks after the distribution of the supervisors' papers. They are required to follow the Citizen's general rules and the rules relating to driving Citizen vehicles. They are subject to the usual forms of progressive discipline. Absences must be justified. It is not sufficient that the supervisor arrange a replacement on his own. They may not work for the Citizen's competitors.

6. Since the Board is to assume the truthfulness of the witness's testimony and since both parties referred to that testimony in argument, it is not necessary to separately summarize the findings of fact at this point. Rather, the facts to be assumed as true are found in the arguments and the Board's analysis.

7. Counsel for the applicant summarized a number of factors from the agreed statement and the *viva voce* testimony which, it was submitted, established the drivers as dependent contractors. Those factors include:

the company uses a formula to set the rate for the route, although the city drivers negotiated payment for waiting time if the presses were late in addition;

the company requires the drivers to report at certain times and to load the trucks in a specific order;

the drivers receive a manifest directing delivery on a fixed route;

the drivers do not deal with the customers directly beyond delivering the papers and do not handle any money;

any drivers have worked for the company for a number of years;

drivers are "hired" for a specific route and may have more than one route;

the papers must be delivered six times per week, fifty-two weeks per year;

the majority of drivers take little or no vacation but can use helpers and/or use substitute drivers or trucks to complete the deliveries;

drivers are paid twice a month;

no deductions are made from the payments in respect of UIC, benefits, etc.

The witness himself does not perform other work at present although he had done so in the past, and does not solicit other work. He has occasionally used his son as helper and, in a

few instances during the seven years he delivered papers, has paid a substitute. Counsel referred to the following cases in support: *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104; *Superior Sand, Gravel & Supplies Ltd.*, [1978] OLRB Rep. Feb. 119; *Flintkote Company of Canada Limited*, [1978] OLRB Rep. Sept 822; *Indusmin Limited*, [1979] OLRB Rep. Mar. 213; *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198; *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057; *Tremways (1982) Limited*, [1983] OLRB Rep. Feb. 289.

8. Counsel for the respondent submitted that the drivers would have satisfied the common law test as “independent contractors” and, while agreeing that the legislation provided the appropriate standard, asserted that the common law factors (ownership of tools, chance of profit/risk of loss, control/direction, etc.) were still significant in examining the nature of the relationship. Turning to section 1(1)(h) of the Act, counsel contended that, in the words of the statute, there must not only be economic dependence but such economic dependence must flow from the “terms and conditions” regarding the performance of the “work”. The economic dependence could result from *both* a legal or practical impediment to obtaining other income. Examples of legal impediments given were prohibitions on working for competitors, restrictions on PCV licences, financing conditions restricting use of the vehicle, etc. “Work” which occupied a “full day” so that there was no time to obtain other work, although there were no legal restrictions, was cited as a “practical” restriction establishing economic dependence. Counsel submitted that the groundwork for such an analysis was laid in *Nelson Crushed Stone*, *supra*, in the reference to “economic mobility” at paras. 14 and 15. From a labour relations viewpoint, counsel argued it would be anomalous to treat differently two individuals, both performing the same “work” for the respondent but where one had a full-time job elsewhere (counsel for the applicant had initially conceded that such persons could not be dependent contractors, see para. 9 below). Essentially, counsel asserted that individuals in a “casual” or “part-time” relationship could not be “dependent contractors” within the meaning of section 1(1)(h) and referred to *Superior Sand*, *supra*, and *Indusmin*, *supra*, in support. In the instant case, the witness acknowledged other sources of income (as high as 20% in one instance) in the past and the respondent imposed no restrictions of a legal or practical nature on obtaining such income. At best, the deliveries occupied four hours per day and probably only three (i.e. the two hours agreed average city delivery time plus one hour waiting at the ramp for loading). Thus, counsel submitted the fact that the witness’s sole source of income was the respondent was misleading; i.e., the “dependency” was not related to the nature of the economic relationship. Counsel then argued the proper comparison under section 1(1)(h) was between the individuals in question and “employees” or “independent contractors”. It was submitted that the Board cases which utilized “entrepreneurs” rather than “independent contractors” as the standard had created an unwarranted gloss on the legislative terminology. In the instant case, counsel asserted several of the factors relied on by counsel for the applicant (e.g. start time, loading order) were actually “neutral” in that these conditions applied to both admittedly independent contractors and the contested group. Moreover, there was some evidence of negotiations around the “formula” and regarding waiting time payments, parking tickets and extra payment where the load was short papers. Counsel stressed that there was no personal obligation to perform the deliveries, that substitutes could be freely provided and that the statutory language implied such a personal obligation. Counsel referred to *Algonquin Tavern*, *supra*, for the proposition that the statute could not be stretched out of all proportion and to regard the drivers in question as dependent contractors would do just that. In summary, counsel submitted the drivers were not dependent contractors on three grounds. Firstly, the economic dependence, if it could be said to exist, did not flow from the terms and conditions between the parties and, hence, was not economic dependence

within the meaning of the statute. Secondly, even if economic dependence was established, the nature of the relationship was more closely analogous to independent contractor than employee. Thirdly, the concept of "obligation to perform" the duties was essential to the statutory definition and such a personal obligation was not present in the instant case.

9. In reply, counsel for the applicant rejected the assertion that one could not fall within the statutory definition of dependent contractor if one was "part-time", as counsel for the respondent had used the term. It was asserted the appropriate measure for assessing dependency is the actual source of income, not the potential for other earnings. Further, that similar conditions applied to independent contractors did not "neutralize" those facts; the facts remained and it was for the Board to assess those facts in the context of the statute and the jurisprudence. Whatever the theoretical scope for negotiation of rates, in fact, such negotiations were minimal. Finally, counsel submitted that the drivers were integrated into the respondent's operation and cited *Tremways, supra*, in support.

10. The statutory definition of dependent contractor, set out in section 1(1)(h) of the Act, reads thusly:

1.-(1) In this Act,

- (h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

11. Whether or not individuals are dependent contractors within the statutory definition is a factual determination requiring consideration of the circumstances of each case (See *A. Cupido Haulage Ltd.* [1980] OLRB Rep. May 679 which referred to the Board engaging in a comparative exercise "to determine on which side of the mid-point of an imaginary line between independent contractor and employee the disputed persons fall," (at par.17)). In the Board's view, this factual determination in the instant case is not straightforward. Both counsel have noted factors which support their respective positions. The Board, however, considers that several comparisons are of particular assistance in analyzing the circumstances.

12. Firstly, it is useful to contrast the situation of the drivers in respect of whom this application is filed with another group of "drivers" clearly employees of the respondent. This latter group, called district supervisors, distributed the afternoon edition in the city. Trucks owned, insured and maintained by the respondent are used for the deliveries; the trucks bear the respondent's logo and colours. The district supervisors are assigned routes and any changes are monitored and subject to approval. The usual statutory deductions applicable to employees are taken from the bi-weekly salary. The district supervisors are required to phone in when sick, to obtain approval of vacation schedules, to justify any absences and to conform to the respondent's general rules and rules relating to driving vehicles of the respondent. The district supervisors are subject to the progressive discipline. The usual hiring process is followed, including a medical examination and creation of a personnel file, and training is provided. Of considerable note is that a district supervisor may not unilaterally arrange for a replacement and is prohibited from working for the respondent's competitors. In all the foregoing respects, the circumstances of the drivers in question stand in sharp contrast. To be sure, there was

little evidence of “discipline”. There was some indication of “warnings” and even perhaps of a “dismissal” but these acts would be equally consonant with a contractual relationship where one party breached the terms of the contract. Moreover, while the factors noted above, such as, the absence of statutory deductions from the payments to the drivers in question, are not individually determinative, taken together, the factors do set apart the “city and country” drivers from, not just the other employees of the respondent, but a sub-group of employees who perform not dissimilar functions.

13. A second useful comparison is between the drivers in question and other admittedly independent contractors also performing the identical function. This latter group comprises individuals who regularly utilize others to deliver the papers. Some independent contractors own their own cartage companies; some are responsible for one or more routes and hire employees to drive all or some of the routes. Conditions such as a reporting time, designated loading order for trucks, a manifest showing drop-off points, apply equally to both groups. This is not to say that such factors become “neutralized” in the sense of being non-existent. It may, however, suggest that the factors are reflective of the nature of the respondent’s business, rather than evincing a “dependency” or absence of control analogous to an employee. The respondent publishes a daily newspaper, morning and afternoon editions, six days per week for the fifty-two weeks of the year. As noted earlier, the afternoon edition is delivered by district supervisors. The morning edition, in either the “country” or “city” version, is delivered by the drivers in question. However, the morning newspaper may be likened to “perishable” goods; it is of no value if delivered that afternoon, let alone the next day. Thus, the Board regards the establishment of a loading order for trucks (so that those with the farthest to go are loaded first), the setting of a reporting time and a manifest with what the respondent considers the optimum route (although this order is not binding on the driver) as flowing from the nature of the respondent’s business. These factors, then, do not assist the applicant in satisfying the statutory definition.

14. The third comparison involves an examination of the Board’s jurisprudence in the area. The cases reveal a number of relevant factors or “clusters” of factors. The Board would note, though, that the factors must be utilized with caution as indicia of dependent contractor status in one industry may not be of great use in a different industry. One “cluster” of factors focuses on the identification of the company with the allegedly dependent contractor, e.g., use of logo and/or decals on delivery vehicles, wearing of company uniforms, etc: see *Tremways, supra*; *Miore Distributing*, [1981] OLRB Rep. Feb. 192; *Western Dispatch Inc.*, [1979] OLRB Rep. Apr. 362; *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083. No such indicia are present in the instant case. Another “cluster” deals with the ownership of the delivery vehicles, including financing arrangements, ownership of or restrictions on PCV licences, insurance restrictions and minimal levels of insurance, vehicle size and type restrictions. The more involved the company in dealing with the vehicles, the more likely dependent contractor status is made out: see *Nelson Crushed Stone, supra*; *Western Dispatch, supra*; *Tremways, supra*. Again, in the instant case, the drivers own, rent or borrow their trucks; the respondent is not involved in any way. The respondent does not set or monitor truck size or type, insurance levels, licences, etc.

15. The third “cluster” deals with the financial arrangements between the parties. Where the company unilaterally sets the rates, where the company deals directly with the customer in setting prices for the goods or services and in bearing the risk of non-collection, where the risk of loss/chance of profit from the operation accrues to the company, it is likely

that the relationship will be found to be that of dependent contractor: see *Nelson Crushed Stone*, *supra*; *Adbo Contracting Company Ltd.* [1977] OLRB Rep. Apr. 197; *Superior Sand*, *supra*; *Flintkote*, *supra*; *Indusmin*, *supra*; *Miore Distributing*, *supra*. In *Nelson Crushed Stone*, *supra*, for example, not only did the company set the rate, but if a reduced price was negotiated with the customer, the company unilaterally passed along this reduced rate to the driver, without advance notice or opportunity to affect the quantum of the reduction. In essence, where the driver has been found to supply his or her labour and the “tools of the trade” (i.e., a vehicle), dependent contractor status has been made out: see *Superior Sand*, *supra*; *Adbo Contracting*, *supra*.

16. In the instant case, the financial arrangements do not unequivocally point in one direction. The company does set the rate according to a formula but there is some room for individual negotiation about increases, variations in the rate and extra payment for delivering papers where the initial load was short. Additionally, the city drivers negotiated payment for waiting time. Drivers are free to more efficiently organize their route and, thereby, reduce their costs. On the other hand, the drivers do not deal with customers directly or handle monies relating to customer accounts.

17. It is useful to refer to the *Algonquin Tavern* case, *supra*, wherein are listed factors which, alone or in combination, have been utilized to support a finding of dependent contractor status:

1. *The use of, or right to use substitutes.* It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else’s labour rather than one’s own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.
2. *Ownership of instruments, tools, equipment, equipment, appliances or the supply of materials.* These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual’s own labour. On the other hand, reliance upon another’s financial or capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. *Evidence of entrepreneurial activity.* This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop “clients”, the use of agents, and organizing one’s “business” (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a “chance of profit” or “risk of loss”; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.
4. *The selling of one’s services to the market generally.* If the purchasers of individual’s services are numerous and of diverse character, the individual looks more like an independent self employed person than

an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.

5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.* Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has "tied his fortunes".
6. *Evidence of some variation in the fees charged for the services rendered.* This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.
7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.* Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer, that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his "non performing" time with unrelated ancillary duties. (See: *Whittaker, supra.*)
8. *The degree of specialization, skill, expertise or creativity involved.* If these are a dominant element in the relationship, the control test

becomes less useful as an indicator of employee status, and in the absence of “integration” into the respondent’s organization, the disputed individual is “self-employed” professional.

9. *Control of the manner and means of performing the work - especially if there is active interference with the activity.* However, it is the *right* to interfere rather than the *ability* to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at *will* and *without* cause may indicate an employment relationship whether or not the employer exercises this power.
10. *The magnitude of the contract amount, terms, and manner of payment.* If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be “employees”; and independent professionals may charge an hourly rate rather than a block fee).
11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.* The employer’s established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm’s employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee.

18. A number of these factors have already been discussed. The Board would here note, however, that the drivers are entitled to use substitutes (rather than just “helpers”) without prior consultation with or approval of the company. The company does not monitor such use of substitutes beyond, of course, insisting that the papers be delivered at the appropriate time and place. This authority contrasts with the relationship in *Miore Distributing, supra*, where the company supplied the substitute and *Western Dispatch, supra*, where the company’s consent to a replacement was required.

19. Items 5 and 7 of the listing set out in *Algonquin Tavern, supra*, are also of particular interest in the present circumstances. It is true that a number of the drivers have been associated with the company for several years; the witness, for seven years. However, as stated in *Algonquin*, the integration of the individuals into the company’s organization is to be distinguished from mere coordination of the individual’s activities. In this case, as the contrast between the drivers and the district supervisors underscores, the Board does not consider the

drivers have been integrated into the company's operation. The economic mobility or independence of the drivers is also unusually high. The drivers are not "on-call" during the day to serve the company. There is a set route which takes relatively few hours of what would be expected to constitute a normal workday. City drivers average two hours to complete a route plus one to one and a half hours loading time. County drivers spend somewhat longer - an average of six hours. However, this time is "round trip", i.e., from the individual's home (which is in the country in the majority of cases) to the individual's home after picking up the papers in the city and making deliveries. It is not usual to calculate "working time" by computing the "door-to-door" period. Thus, the average of six hours must be regarded as an outside figure. Apart from the delivery route(s), the drivers have no restrictions whatsoever in earning other income, including working for competitors of the company. The "waiting time" services negotiated by the city drivers supports the inference that the payment is in the nature of an "opportunity cost".

20. It may well be that an individual is "dependent" on more than one person: see *Craftwood Construction Co. Ltd.*, [1980] OLRB Rep. Nov. 1613. [Dependence upon more than one person, however, must be distinguished from dependence upon an industry: *Algonquin Tavern, supra.*] The Board is of the view, though, that the economic dependence necessary under the definition in section 1(1)(h) of the Act must flow from the terms and conditions of the relationship between the parties. In the instant case, it is true that the witness stated (and it is to be assumed true) that his only source of income was the company. In that sense, he is in a position of economic dependence. That dependence, however, does not flow from the terms and conditions of the relationship. There is nothing explicitly restricting the drivers from seeking the income (no PCV restrictions, no prohibition against dealing with competitors, etc). Nor are there any implicit restrictions (identification with the company through logos or uniforms, an "on-call" situation for the working day or obligation to serve the respondent first, etc.). While the city drivers have negotiated waiting time payments and spend somewhat less time performing the deliveries than the country drivers (although the difference is not great given the different means of calculating the time spent), the Board is not persuaded that the differences are sufficient to lead to a different conclusion. Thus, on balance, after considering the points of comparison and relevant factors as set out above, the Board finds that the drivers are not dependent contractors within the meaning of section 1(1)(h) of the Act.

21. As the applicant argued the matter on a "best-case" basis and the Board finds that dependent contractor status is not made out, the application for certification is hereby dismissed.

3070-84-M Danver Ambulance Service Inc., Employer, v. Ontario Public Service Employees Union, Trade Union

Collective Agreement - Conciliation - Reference - Collective agreement signed subsequent to date on which it would have expired - Containing automatic renewal clause - Notice for renewal given after expiry date untimely as agreement automatically extended - Minister not having authority to appoint conciliator - Whether employer monetary proposal made by phone amounting to "met and bargained" within meaning of S. 16(2)

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *Mark Contini, Dan McArthur and Verna McArthur* for the employer; *Linda R. Rothstein, Jim McConachie and Jaqueline Gardner* for the trade union.

DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; June 18, 1985

1. This is a reference pursuant to section 107 of the *Labour Relations Act* wherein the Minister seeks the opinion of the Board as to whether he has the authority to appoint a Conciliation Officer.

2. The parties agreed on the relevant facts as follows:

- (a) The union was certified as bargaining agent on January 19, 1983.
- (b) Negotiations for the 1983-4 collective agreement were held: in 1983 on August 12, September 2, October 13, November 4; in 1984, on February 9 and May 8; for the latter two meetings, the parties were at conciliation.
- (c) The union initially sought a fifteen month contract while the employer wished a twelve month contract corresponding with his fiscal year of April 1 to March 31. Both parties were agreed that the expiry date of the collective agreement should be March 31, 1984 however.
- (d) The parties entered into a collective agreement on May 28, 1984 for a one year term, from April 1, 1983 to March 31, 1984. That is, the 1983-84 collective agreement had already expired as of the date it was concluded. The parties noted that the collective agreement referred to April 15 as the date of commencement of the contract but agreed this was an error and April 1 was the actual date the collective agreement commenced operation.
- (e) The collective agreement was formally executed in August 1984; the union had forwarded copies in June 22, 1984 signed by the appropriate union officials and the company president, Dan McArthur, affixed his signature on August 17, 1984.

- (f) Peter Monsen, the accountant for the employer, acted as company negotiator for the 1983-4 collective agreement.
- (g) By letter dated October 29, 1984, Jackie Gardner, union staff representative, notified Dan McArthur, "pursuant to Article 21 of the collective agreement" (to quote from the letter), of an intention to bargain amendments to the collective agreement which had expired on March 31, 1984. Prior to this letter there had been no written or verbal communication to the employer regarding an intention to bargain in respect of a 1984-5 collective agreement.
- (h) In November 1984, Gardner twice contacted McArthur by telephone to obtain negotiating dates. In these conversations, McArthur did not object to the October 29 notice as untimely but did state that he would contact Monsen to arrange free dates for the parties to meet.
- (i) In December 1984, Monsen contacted Gardner by telephone. Monsen asked if the union would be willing to negotiate the 1984-5 and 1985-6 collective agreement together and, if so, the employer was prepared to give a 5% wage increase automatically in respect of 1984-5 to bargaining unit employees. Monsen did not raise the issue of the timeliness of the notice to bargain. Gardner refused Monsen's offer and advised him that there were issues other than wages to be dealt with in the 1984-5 collective agreement. Monsen replied that he would speak to his client and get back to Gardner.
- (j) When Monsen had not contacted Gardner by January 15, 1985, the union applied for conciliation.

3. To complete the chronology:

- (i) On January 17, 1985, the Minister received the union's request for the appointment of a conciliation officer under section 16 of the Act;
- (ii) On January 22, 1985, the employer's objection to the appointment was received;
- (iii) On February 7, 1985, the union's response to the objection, again requesting the appointment of a conciliation officer was received.

4. The reference to the Board by the Minister is:

"Briefly stated, the question is whether or not the trade union's failure to give timely notice to bargain has resulted in the extension of the collective agreement for an additional twelve months past its expiry date of March 31, 1984."

5. Counsel for the employer asserted that the union had not complied with the notice

provisions in Article 21 of the 1983-4 collective agreement and, therefore, in accordance with Article 21.01, that collective agreement had been continued for 1984-85. As the notice provisions in the collective agreement were the same as in section 53(1) of the Act, the union had not given timely notice to bargain under the statute either. Counsel submitted that the provisions of section 53(1) could not be abridged or extended by the parties except in accordance with section 53(2). Counsel referred to *Otto's Deli*, [1980] OLRB Rep. Nov. 1673 in support. The fact that the 1983-4 collective agreement had expired in accordance with its terms on the date the agreement was concluded (on May 28, 1984) was irrelevant in that the parties could have negotiated language to deal specifically with notice in respect of the 1984-5 collective agreement and, thereby, provided an alternative route for timely notice, as permitted by section 53(2), in lieu of the section 53(1) provision. Consequently, counsel argued that the October 29th letter did not constitute timely notice under the Act. Further, the telephone calls in November and December, it was asserted, fell far short of the standard in section 16(2), i.e., that the parties "met and bargained"; counsel referred to *Dryden 5¢ to \$1.00 Store Limited*, [1974] OLRB Rep. May 303. In summary, counsel asserted a conciliation officer should not be appointed.

6. Counsel for the union submitted that the Board should find, from the signing of a collective agreement on a date post its expiry, that the employer had waived his right to object to the timeliness of the notice to bargain, or, that the collective agreement be interpreted so as to give effect to the reasonable expectation of the parties that they would negotiate for the 1984-5 collective agreement. Counsel argued that the fact that the employer did not indicate that the union was precluded from negotiating for the 1984-5 contract entitled the union to negotiate that contract notwithstanding the provision of Article 21. It was submitted that the notice to bargain on October 29, 1984 was reasonable given the date the collective agreement was actually executed, i.e., August 17, 1984. Moreover, the employer or his representative did not object to the timeliness of the notice in the telephone conversations of November and December and, indeed, had attempted to bargain subsequent to the notice. This conduct, in its entirety, supported the inference that the parties intended to bargain about the terms and conditions of the 1984-5 contract. Counsel also submitted the provisions of section 53(1) were directory, not mandatory; *Peel Memorial Hospital*, [1977] OLRB Rep. July 452 and *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568 were referred to in support. The directory nature of section 53(1) and the circumstances of the 1983-4 negotiations and the subsequent conduct of the parties, it was contended, enabled the Board to find the notice to bargain on October 29, 1984 constituted notice within the meaning of section 53 of the Act. In the alternative, counsel argued that the Monsen telephone call satisfied the standard in section 16(2) that the parties had "met and bargained." That is "meeting" could include contact by telephone although counsel acknowledged the only case found dealing with the point was a "clear" case of bargaining (*Adath Catering Company (A Division of Michael Firestone Services Limited)*, [1975] OLRB Rep. June 482). Counsel contended Monsen had made an offer to the union in that telephone conversation and the *Dryden* case, *supra*, did not preclude the Board finding there had been negotiations, particularly since the offer had not been "without prejudice". In conclusion, then, counsel asserted the Board should find that section 53 notice had been given in the circumstances or, in the alternative, that section 16(2) had been satisfied so that the timeliness question was irrelevant. In either instance, counsel submitted a conciliation officer should be appointed in respect of negotiations for the 1984-5 collective agreement.

7. In reply, counsel for the employer expressed his skepticism at the union's position

that section 16(2) had been satisfied in view of the union's statement on the application for a conciliation officer appointment that the parties had not held any negotiating meetings. Finally, and although not conceding that the Board had a discretion to determine whether there was "53(1)" notice, counsel submitted that the conduct of the union in delaying from May 28th to October 29th in giving notice should not weigh in the union's favour.

8. It is appropriate to set out the relevant sections of the Act at this point:

53.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

16.-(1) Where notice has been given under section 14 or 53, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(2) Notwithstanding the failure of a trade union to give written notice under section 14 or the failure to either party to give written notice under sections 53 and 122, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

9. It is also useful to set out the provisions in the collective agreement regarding its duration:

21.01 Except where otherwise provided, this agreement shall be binding and remain in effect from April 15, [sic] [should read April 1] 1983 to March 31, 1984, and shall continue from year to year thereafter unless either party gives the other party notice in writing within the ninety (90) day period prior to the termination of the agreement that it desires its termination or amendment.

21.02 Either party desiring to propose changes to this agreement shall, within ninety (90) days prior to the termination date, give notice in writing of the desire to propose changes.

10. Section 53 deals with the manner and timing of giving notice to bargain for a new collective agreement. Simply put, section 53(1) establishes the notice period as the last ninety days prior to the expiry of the collective agreement. Section 53(2) enables the parties to incorporate notice provisions in their collective agreement and deems compliance with those provisions constitutes compliance with section 53(1). The parties, however, cannot avoid or abridge the substantive right contained in section 53(1) by their agreement on provisions regarding notice in the collective agreement: see *Otto's Deli*, *supra*.

11. The Board agrees with the submission of counsel for the union that the provisions of section 53(1) are directory, not mandatory: see *Dravo of Canada Limited*, *supra*; *Peel Memorial Hospital*, *supra*. However, the Board is also of the view that whether notice which apparently falls outside the period prescribed in section 53(1) constitutes notice within the meaning of section 53(1) is limited by, at least, the terms of the collective agreement itself and the timing of the notice. It is one thing to find that, in the circumstances, *early* notice

(i.e., notice given prior to the last ninety day period before the expiry of the collective agreement) constitutes notice within the meaning of section 53(1). It is quite another matter where notice is given *after* the expiry of the collective agreement. In the latter case, the provisions of the “expired” collective agreement are critical. That is, where the collective agreement contains no provision for its “automatic” renewal if timely notice is not given, the Board may still find that such “late” notice constitutes notice within the meaning of section 53(1) of the Act. Such a finding will, of course, depend on the factual context of that particular case, including relevant labour relations considerations. Where there is provision for automatic renewal of the collective agreement where timely notice to bargain is not given, the Board is of the opinion that “late” notice, given after expiry of the collective agreement and, therefore, after the collective agreement has been automatically renewed for a further period of at least one year, cannot constitute notice within the meaning of section 53(1). To hold otherwise would be to permit “bargaining”, with the possibility of economic sanction, about the terms and conditions of a collective agreement which has already commenced operation. Such “mid-term” economic sanctions are, of course, prohibited under section 72 of the Act.

12. Thus, the interpretation of section 53(1) urged by union counsel conflicts with the statutory scheme for the negotiation of collective agreements and is not supported by the cases cited. For example, in *Dravo of Canada Limited, supra*, the collective agreement did not contain a provision for its automatic renewal. Thus, while the notice was unusually “late”, there was no collective agreement in operation. In the circumstances, also quite unusual, the Board found the notice to bargain was notice within the meaning of [now] section 53(1); (see also: *Sudbury Paint and Wallpaper Co. Ltd.*, [1964] OLRB Rep. Apr. 48). In *Backstay Standard Co. Ltd.*, 46 CLLC 16,462, notice was given *prior* to the expiry of the collective agreement, albeit not with ten clear days’ notice, and is, thus, readily distinguishable. The decision in *Re Lincoln County of Roman Catholic Separate School Board and Buchler*, [1972] 1 O.R. 854 (Ont. C.A.) is also not of assistance as the failure to comply with the appointment period did not trigger anything comparable to the renewal of a collective agreement. Finally, the Board does not regard the decision in *Peel Memorial Hospital, supra*, as establishing a right to give notice after the expiry of the collective agreement where that collective agreement contains an automatic renewal clause. The Board in *Peel* was faced with a unique situation, the impact of a roll-back by the A.I.B. in a collective agreement. Paragraph 23 of that decision underscores the contrast between the “normal” situation and the circumstances of a potential roll-back in the context of the statutory provisions as to notice to bargain:

23. Under normal circumstances the parties to a collective agreement are well aware of the agreement’s termination date. Prior to the termination, therefore, either party can give the other notice of its desire to bargain. In the rollback situation neither party to the agreement is able to know at any time prior to the rollback that their agreement will be rolled back and rendered void. In a rollback situation, therefore, it is impossible for either party to give notice to bargain during the time set out in section 45, that is, ninety days prior to the termination of the agreement.

13. Counsel for the union argued that the signing of a collective agreement after the date on which it would have expired in accordance with its terms plus the failure of the employer to object to the timeliness of the notice following October supported a reasonable inference that the parties intended to negotiate the 1984-5 collective agreement. The Board does not agree. The language of Article 21 regarding the renewal of the collective agreement is clear and unambiguous. Although probably infrequent, it is not unheard of for parties to settle a contract after its stipulated term. The parties could have dealt with the issue of negotiations for the 1984-5 contract through specific language or by simply not including the

automatic renewal provision. The latter approach would have kept open the possibility of "late" notice as stated earlier. In the circumstances, however, the parties must live with the consequences of their bargain, even if regretted or unintended: see *Universal Handling Equipment Company Limited*, [1979] OLRB Rep. Apr. 356, particularly at paragraphs 12, 13. Further the Board does not consider that, in the evidence, there was constructive notice to bargain the 1984-5 collective agreement given by the union during the bargaining of the 1983-4 contract: see *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. Aug. 759.

14. The Board does have concerns, from a policy viewpoint, as also raised in the dissent of Board Member Grasso, about a collective agreement which "expires" according to its terms on the date on which it is signed. However, the Board would note that the consequence of finding that the collective agreement is not "in operation" so that notice could be given with respect to section 53(1) is that the collective agreement is not "in operation" at all. In that event, either the parties concluded a collective agreement with an indefinite term of operation or they did not conclude a collective agreement. In the first instance, it could be argued that the collective agreement, by virtue of section 52(1), was deemed to have a term of one year. However that collective agreement would necessarily include the automatic renewal provision and, thus, the Board's analysis would lead to the same conclusion that the Minister does not have authority to appoint a conciliation officer (see, paragraph 18 *infra*). In the alternative, if no collective agreement was ever concluded between the parties, the Minister would still not have authority to appoint a conciliation officer as one had already been appointed and met with the parties on February 9 and May 8, 1984, prior to the "signing" of the "collective agreement". Thus, while the Board has some concerns, as noted, the Board does not regard the above analytical approach as leading to a different conclusion.

15. Even if the Board could properly find that notice given after the expiration of a collective agreement and its automatic renewal is notice within section 53(1) (which is seriously doubted), the Board would not find that notice to bargain has been given in this case. Apart from the *Dravo* case, the decisions seem to suggest a brief delay in giving notice might not be fatal (see *Backstay supra*). However, in this case, the delay was lengthy (until October 29, 1984), months after the expiry date. The union counsel asserted the "reasonable" period should run only from the date of formal execution of the collective agreement, i.e. August 17, 1985. Firstly, the Board does not agree that notice needed to await the formal execution of the 1983-84 collective agreement. In any event, though, the union did nothing until October 29th. The union offered no explanation whatsoever for this continued delay in giving notice, a period well in excess of the "few days" referred to in *Backstay, supra*. Finally, the acceptance of the lengthy delay in *Dravo, supra*, turned on labour relations considerations not paralleled in the instant case. Thus, if union counsel is correct in the assertion that the Board has a discretion to find the notice given in October complies with section 53(1) of the Act, the Board, in view of the considerable and inexcusable delay, would not exercise its discretion in this case.

16. The Board must still examine the conduct of the parties in the late Fall of 1984 in the context of section 16(2) of the Act. The Board rejects the union's assertion that the conduct could satisfy the requirements of section 16(2) with respect to negotiations for the 1984-5 contract. Section 16(2) was intended to prevent one party from relying on a technical failure by the other party to give notice where, on the evidence, the parties had actually initiated negotiations. Section 16(2), however, cannot be read so as to provide a vehicle for negotiating the terms of a collective agreement, including its duration and with the possibility of economic

sanctions if the parties fail to settle, in respect of a collective agreement which has already commenced operation. Such an interpretation would fly in the face of the section 72 prohibition of mid-term strikes or lockouts.

17. The phrase “met and bargained” in section 16(2) has not been the subject of much comment by the Board. In *Adath Catering, supra*, the Board found that, on the facts, the parties had satisfied the standard. (Parenthetically, it is appropriate to note that the collective agreement in question had an automatic renewal clause but the parties had initially met and bargained *before* the expiry of the contract. The parties’ conduct post-expiry was found to be consonant with continuation of that bargaining.) Conversely, in *Dryden, supra*, the Board found the parties had not “met and bargained”; the employer had simply made unilateral and *ex gratia* offer of an unspecified wage increase (and another item). The Board does not intend to here set out an extensive analysis of the standard in section 16(2). However, the Board is of the view that “met and bargained” need not necessarily involve a “face-to-face” meeting provided a person authorized to bargain for one party tables a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party. In the instant case, Monsen, chief negotiator for the employer, made a monetary proposal to Gardner, the union representative. The Board does not consider that the offer was any less an offer because the contact was via the telephone. Monsen did not place his offer on a “without prejudice” basis. To be sure, it is more usual perhaps for the parties to meet across a bargaining table, often in “teams”, and table extensive proposals in writing. As noted, the Board does not consider it appropriate or necessary in this case to set out a definitive statement on the standard in section 16(2). In these, circumstances, though, the Board is of the opinion that the parties met and bargained in December 1984, with respect to the 1985-6 collective agreement. Because the parties’ conduct in late Fall 1984 was relied on by the union in its argument, the Board considers it appropriate, although not essential, to include the comments in this paragraph in responding to the Ministerial reference.

18. It is clear that, other than during the “open” period, where there is a binding collective agreement the Minister does not have authority to grant conciliation services under section 16(1): *The Religious Hospitallers of Hotel Dieu of St. Joseph of the Diocese of London in Ontario at Windsor*, [1974] OLRB Rep. Oct. 739; *Canada Forgings*, [1983] OLRB Rep. Jan. 50; *Universal Handling Equipment Company Limited*, [1979] OLRB Rep. Apr. 356; *Hickeson-Langs Supply Company*, [1978] OLRB Rep. Nov. 996; (cf. *Sperry Vickers Division Sperry Inc. Canada*, [1983] OLRB Rep. July 1208 where the Board found no collective agreement was in operation as the company offer had been properly withdrawn, in good faith). Thus, for the reasons stated, the Board considers that the Minister does not have authority, pursuant to section 16(1) of the Act, to appoint a conciliation officer with respect to the 1984-5 collective agreement. That agreement was automatically renewed, in accordance with the terms of the 1983-84 contract when the latter contract was entered into in May 1984. In terms of the question put by the Minister, the trade union’s failure to give timely notice to bargain did result in the extension of the 1983-84 collective agreement for an additional twelve months past its expiry date of March 31, 1984.

DECISION OF BOARD MEMBER P.V. GRASSO;

1. I dissent from the opinion of the majority. In my opinion the Minister has both the authority and an obligation to appoint a conciliation officer with respect to the 1984-1985 collective agreement.

2. The majority views the collective agreement in question as having been automatically renewed for want of notice to bargain being given, and concludes that notice given after automatic renewal cannot constitute notice under the Act. It is important to note that the collective agreement was completely retrospective in effect. It became operative and ceased operation at the same instant - the moment it was entered. At no time was it an agreement "in operation", and thus under no circumstances could the union have given notice to bargain before the contract ceased operation.

3. Because the automatic renewal clause precluded the giving of notice in the unique circumstances of this case, it is my view that the clause is invalid, and the agreement cannot be taken to have renewed itself. As the majority notes in paragraph 10, the parties "cannot avoid or abridge the substantive right contained in section 53(1) by their agreement on provisions regarding notice in the collective agreement." Although the union could have given notice to bargain for a second contract before the first was entered, there is no requirement that it do so, and its failure to do so cannot weigh against it. Indeed, it would be most unreasonable to expect such action in the context of first-contract negotiations.

4. There is no question that the union could have given notice to bargain for a new contract earlier than it eventually did. The employer did not object to the notice as untimely, however, and in fact contacted the union by telephone in November of 1984, offering an immediate 5% raise in return for a two year deal covering 1984-1985 and 1985-1986. In my view, the only fair inference is that the parties "met and bargained" notwithstanding the union's failure to give timely notice. The majority opinion that the bargaining concerned only the 1985-1986 period is not a finding open to the Board, given paragraph 2(i) of the agreed statement of facts.

5. To sum up, it is my view that the renewal clause is invalid as it operated to preclude the substantive right of the union to give notice to bargain under section 53(1). I find, further, that the parties have met and bargained, and that in these circumstances, section 16(2) empowers the Minister to appoint a conciliation officer. In terms of the question put by the Minister, the trade union's failure to give timely notice to bargain did *not* result in the extension of the 1983-1984 collective agreement for an additional twelve months past its expiry date of March 31, 1984.

2904-84-U Abdel Elejel, Complainant, v. International Molders & Allied Workers Union, Local 49 (London), Respondent, v. The Windsor Machine Company c.o.b. as Hifield Canada, Intervener

Duty of Fair Representation - Remedies - Unfair Labour Practice - Animosity between union official and grievor - Grievor discharged for incident instigated by and involving union official - Union official not disclosing his involvement in presenting grievance to membership - Acting as prosecutor and defender creating conflict of interest - Breach of representation duty - Arbitration with dependent counsel directed without further referral to union membership - Whether exclusion of grievor's lawyer from union meeting unlawful

BEFORE: *Paula Knopf*, Vice-Chairman.

APPEARANCES: *Christopher Bentley, Arif Haidir, Marie Soucey, Carmella Vecchio and Abdel Elejel* for the complainant; *Frank Luce and Gord Plancke* for the respondent; *Norman A. Keith* for the intervener.

DECISION OF THE BOARD; June 26, 1985

1. This is a complaint under section 89 of the *Labour Relations Act* that alleges that the complainant, Abdel Elejel, has been dealt with contrary to the provisions of section 68 of the Act. The complaint alleges that the Union is responsible for the acts of some of its officers in carrying out a course of conduct of harassment towards the complainant and ultimately deciding not to carry the complainant's grievance to arbitration despite the fact that the incident which led to the grievance was allegedly instigated by the Union officials themselves. The complainant submits that the Union's actions constitute a breach of their duty of fair representation for acting in a manner that was arbitrary, discriminatory and in bad faith.

2. The hearing of this matter took four full days of testimony. The intervener was represented on the first day, however chose not to participate or appear in the remainder of the hearing. The evidence was characterized by a great deal of emotional testimony. Many of the key issues of the case turn on several findings of credibility. However, both the evidence of the complainant and the Union was marked by internal inconsistency as well as the inconsistent points of view of the two parties. Therefore, to some extent, a detailed review of the evidence is necessary.

3. Because of the allegations of the complainant, his background and ancestry are relevant to these proceedings. He is a gentleman in his fifties. He moved to Canada in 1972 from Jerusalem. He considers himself a Palestinian. He began working with the intervener (the Company) in 1980 and was one of the Company's first employees. Initially he worked as a janitor and at the time of the events which gave rise to these proceedings he was working on one of the machines.

4. The union gained bargaining rights in this Company approximately three years ago. The complainant is a member of that Union. Mr. Elejel alleges that his difficulties with the Union began some time between February and May of 1984. Initially, he believed that the difficulties began in May. He believes the reason for these difficulties stemmed from the fact that he refused to sign a petition that was handed to him by Bob Fleming, one of the Union's

original organizers and Danny Paul, the Union's current plant chairman. Mr. Elejel says he initially refused to sign the petition because he is illiterate in English and could not read it. He asked what it said and was told by Mr. Fleming that it was "for the Union and in my favour and it was not going to harm anybody." However, upon asking the foreman, Mr. Elejel discovered that the petition was designed to ask the Company to fail to recall a worker, Marie Soucey, from layoff. When Mr. Elejel discovered the contents of the document, he refused to sign it. He said that after that refusal, the leaders of the Union and their followers refused to talk or associate with him any further and began a pattern of harassment against him.

5. A copy of a petition was entered into evidence by Marie Soucey. She testified that she received it, under her apartment door, on April the 4, 1984. The petition reads:

Due to the actions taken by Marie Soucey, No. 24 of starting a petition to de-certify a union that is beneficial and solely for the good and rights of the employees of Highfield Corporation of Canada, we the employees of Highfield feel that she is only out for her own well-being and by trying to de-certify this union "is not and never has been a member in good faith." Therefore we the employees of Highfield demand that she not be recalled from layoff.

This petition bears the signatures of Mr. Fleming, Mr. Paul and 14 other employees, including two Union stewards, Grace Fletcher and John Wilding. Mr. Elejel was never asked to identify the petition when he testified. However, the petition was identified and acknowledged by the Union's witnesses, Mr. Paul, Ms. McAleer and John Wilding. In addition, they recalled it being handed to Mr. Elejel. Therefore, there can be no doubt that this is the same petition that Mr. Elejel referred to when he referred to the petition regarding Marie Soucey and his refusal to sign it.

6. Mr. Elejel claims that after his refusal to sign this petition, the Union leaders and their friends began to treat him with abuse. In particular, Mr. Elejel complained about the Plant Chairman, Danny Paul, the steward John Wilding and an original organizer, Bob Fleming. Mr. Elejel cites several examples of this abuse. He says that after he painted his car, he found it scratched with a hammer and a screwdriver in the Company parking lot. However, he does not know who did the damage. In addition, he says that on numerous occasions he would have his safety glasses taken away from him when he put them on the table in the cafeteria. He does not know who did this although he claims that Danny Paul, John Wilding, Bob Fleming and/or Darlene McAleer were present on the occasions when it happened. Further, he explained an ongoing problem he was having with the lights in the cafeteria. He claimed that the lights in the lunchroom were constantly being turned off when he was in the room. This frustrated him a great deal. The frustration erupted into an incident when he claims that Danny Paul and Bob Fleming incited another employee, Cathy Cowie, to keep turning the lights off every time that Mr. Elejel turned the lights on. In addition, the complainant says that Paul and Fleming said "Turn them off while the pig is here." Ultimately, the complainant threw a salt shaker which hit the light switch and broke it as well as the cover on the telephone. He denies he was throwing the salt shaker at Cathy Cowie although that was alleged by the Union witnesses. While the Union alleged that the Mr. Elejel was formally disciplined for this, there was no proof of such discipline and Mr. Elejel denies it. In any event, it is clear that the superintendent tried to resolve the dispute by fixing the light switches to keep them on. However, it is also clear that Bob Fleming then changed the switches back so that the lights could be turned off again.

7. In addition, Mr. Elejel claims that Danny Paul, John Wilding, and Bob Fleming

made frequent insulting remarks to him about his ancestry. He says he was called such things as "P.L.O. Pig", "camel jockey" or "Paki". Further, they made insulting remarks about the hygienic practices of women in his religion. Mr. Elejel claims that Danny Paul would make most of the insulting remarks or "would lead the others to do it." This conduct was denied by the Union witnesses and, they in turn said that it was the complainant who discussed the hygienic practices of women in his religion. The evidence of Marie Soucey was that she heard Danny Paul call out to the complainant a very insulting sexual remark prefaced with the term "Hey Arab." However, Ms. Soucey cannot recall when this occurred. Ms. Soucey does recall Mr. Elejel complaining to her about this conduct.

8. Mr. Elejel also claims that Bob Fleming would purposely delay doing quality checks on the complainant's work so that it would be necessary to redo the work because the quality check had to be made before the work cooled to a certain temperature. Mr. Elejel feels that this conduct was done in order to make his production look insufficient. The Union called no evidence regarding this.

9. Mr. Elejel also complained that he was harassed by having a water bottle spilled or hidden from him as many as two or three times a day. Because he worked beside an oven he liked to keep the water bottle by him. However, he says he would often turn around to find the water spilled. Finally, the bottle went missing. He does not know who did this to him. Marie Soucey said that she once saw his water bottle in the garbage.

10. Finally, the complainant also claimed that he would frequently find his safety boots or work apron hidden from him. The safety boots were missing as many as six or seven times and it would often take him ten to fifteen minutes to find them. A couple of times Marie Soucey helped him find them in the garbage. Carmella Vecchio also found them once in the garbage. The apron was hidden from him twice and on the third time it could not be found. Again, he does not know who did any of this.

11. To corroborate these allegations, Mr. Elejel called two witnesses. One was Marie Soucey and the other Carmella Vecchio. Ms. Soucey discussed hearing Mr. Elejel complain to her about the incidents mentioned above and she confirmed that Mr. Elejel was treated differently after that petition had been circulated. She recalls the fellow workers calling Mr. Elejel names and "talking bad about him." She says that while Mr. Elejel used to be able to joke with the other workers, no one would talk to him after the petition. In addition, the complainant put into evidence a Notice dated June 4, 1984 over the signature of Howard Grieve, the production superintendent, that reads as follows:

It has been brought to the Company's attention that several pranks have been played on some of the employees. So far, the pranks have been in fun, and not harmful, but before this affects the inter-employee relationship and subsequently the smooth operations of the plant, the Company would like to see a stop to all pranks played on any employee while on Company premises.

While there was no evidence directly linking this Notice to the pranks played upon Mr. Elejel, it is clear that Mr. Elejel did complain frequently about the pranks played upon him to Mr. Grieve. There is no evidence of any other pranks being played at that time on other employees. In addition, Danny Paul admitted that he was aware that Mr. Elejel believed that he was being harassed by these pranks, but Mr. Paul denies any knowledge of who was responsible.

12. Mr. Elejel blames Danny Paul for these “pranks”. In Mr. Elejel’s words, “Being the head of the Union, I blame him because he is supposed to know everything going on in the Company with employees and put a stop to it.... I believe he knows about everything. ... I’ve seen him gathering with others and whispering and looking at me.” However, other than his belief that Mr. Paul instigated these acts, Mr. Elejel has no evidence that Mr. Paul was directly or indirectly responsible for any of them. Further, it is the position of the Union that any religious or political comments or discussions or jokes that involved Mr. Elejel were of his own making. Dan Paul and Darlene McAleer recited sexual jokes and stories that they say were told openly and often by Mr. Elejel and which sometimes involved the sexual practices of women of his faith. Mr. Elejel himself denies making any such jokes saying his religion forbids him to do so. However, his own witness, Marie Soucey, recalls occasions when he did joke a lot with other employees and did tell jokes about sex.

13. It was suggested to Mr. Elejel in cross-examination that he would frequently “argue” about religion and politics with other employees at work. This was denied by Mr. Elejel although he did admit “discussing” it with some employees on occasion. The evidence of the Union itself was that while there may have been some discussions, there was no evidence of any arguments.

14. The next event which is important in this narrative is what occurred on August 29, 1984. This is the day that the incidents which gave rise to Mr. Elejel’s discharge occurred. The parties called a tremendous amount of evidence regarding the details of the events on this day. This case does not involve an arbitration of the merits of the discharge and therefore it is neither necessary nor appropriate to relate the various nuances of each witness’ version of the events. Some of the details may be specified more fully below as they reveal important insights into the credibility of some witnesses on more crucial issues, but at this point suffice it to say that the following emerges as the basic story of what happened on August 29th.

15. By Danny Paul’s own admission, he had placed oil and grease over the windshield, handle, and other parts of Mr. Elejel’s car in the parking lot during the two o’clock break on August the 29th. Mr. Paul did this because of his belief that Mr. Elejel had done the same thing to him the previous day. However, Mr. Paul had or has no proof that Mr. Elejel did indeed do this. Mr. Elejel himself denies doing such a thing. In any event, when the work day concluded at 3:30 p.m. on August the 29th, Mr. Elejel went out to find his car covered with oil and grease. Mr. Elejel was understandably upset when he saw this. As soon as Danny Paul emerged from the plant into the parking lot, Mr. Elejel confronted him believing that he was the person who had caused the harm. Mr. Paul alleges that Mr. Elejel struck his face with a greasy hand but Mr. Elejel denies this. In any event, Mr. Paul did get grease on his face at that stage and it must be concluded that it came from Mr. Elejel. Mr. Elejel then turned towards his car. Mr. Paul kicked Mr. Elejel in the seat of his pants. This may have been done gratuitously, as the complainant alleges, or it may have been done, as Mr. Paul alleges, as an act to prevent Mr. Elejel from picking up a stick of wood which Mr. Paul knew was in Mr. Elejel’s car. In any event, Mr. Elejel retrieved the stick of wood, which was approximately two feet long, from the back of his car. He turned around holding the wood and heard Mr. Paul say “You want to fight?” Mr. Paul admits saying that but adds that he also said “Put the stick down if you want to fight”. What then followed was a chase with Mr. Elejel running after Mr. Paul around the parking lot. Mr. Elejel admits, “obviously I lost control of myself; I had to defend myself.” Mr. Elejel had no luck catching Mr. Paul, who is a much

younger man. Mr. Elejel then next recalled seeing John Wilding. Mr. Wilding then threw his lunch box at Mr. Elejel, hitting him on the shoulder. Whether Mr. Wilding acted in self defence or as the aggressor in throwing his lunch box at Mr. Elejel is not the issue in this case. Mr. Elejel responded immediately by hitting Mr. Wilding on the head with the stick of wood. Mr. Wilding fell to the ground. Almost immediately thereafter the superintendent emerged on the scene. The piece of wood was taken from Mr. Elejel. Further, the superintendent spoke to Mr. Paul and Mr. Wilding about the incident.

16. As far as Mr. Elejel was concerned, the incident was over in the parking lot when he hit Mr. Wilding. Mr. Elejel then proceeded home after picking up his wife at her place of work. When he arrived home, he was greeted by three policemen who arrested him and took him into detention for assault with a dangerous weapon. He was held in custody for a number of hours and released on his own recognizance with terms that prevented him from returning to the area of his place of work. While Mr. Elejel says that he was told nothing by the Company at that time, he was told by the police that he had been fired. It is clear from Mr. Paul's evidence that he understood as of August the 29th that Mr. Elejel had been fired for his conduct in the parking lot. However, Mr. Elejel did not know this. Mr. Elejel did not and could not return to work because of the terms of his recognizance. He phoned Harold Grieve the following day to find out his status and was told that it was not true that he had been fired but that he would let Mr. Elejel know what would happen in one week's time. Mr. Elejel later received a letter dated September 6, 1984 advising him that his employment had been terminated effective September the 29th.

17. Mr. Elejel himself did not grieve the discharge. When asked why he did not, he asked in response "To whom should I grieve?" He went on to explain that he felt unable to go to the Company because of the police order keeping him off the premises. When asked why he didn't go to the Union he said "To who should I go? which Union? The head of the Union is the one who is causing me the trouble." In Mr. Paul's mind he believed that Mr. Elejel knew as of August the 29th that he had been fired and that Mr. Elejel had accepted that firing. Thus, no contact was made between either man. Mr. Paul indicated that Mr. Elejel could have contacted the other Union steward, Grace Fletcher, to have filed the grievance. However, it is clear that no such contact was made. Mr. Elejel said "I didn't get in touch with anyone, nor did anyone get in touch with me. I was surprised that no one cared about me.... I was wondering if my membership [in the Union] was still in effect."

18. What Mr. Elejel did do was hire his own lawyer. On or about September the 13th, that lawyer got in touch with the Union's International Staff Representative, Gord Plancke. In a telephone conversation between the two men, later confirmed in writing, Mr. Elejel's lawyer made it clear to Mr. Plancke that Mr. Elejel was taking the position that the Company and the Union were both responsible for Mr. Elejel's termination and that he would be holding the Union jointly responsible for any damages. Further, a demand was made that the Union act on behalf of Mr. Elejel. As a result of the telephone conversation, Mr. Plancke got in touch with Dan Paul on the same day and instructed Mr. Paul to file a grievance on behalf of Mr. Elejel. That grievance was not filed until September the 17th.

19. On September the 17th, the Union held its regularly scheduled executive meeting. At that meeting Dan Paul attended in his capacity as his plant's Chairman. In the course of giving his plant report he advised the Executive that a grievance had been filed on behalf of Mr. Elejel that would be brought before the local membership at the next meeting to discuss

the issue of whether it should be taken to arbitration. The Union's president, Mr. Carl Hamilton, testified in agreement with Dan Paul that all that happened regarding the grievance was that the case was discussed and no recommendation was made by the Executive. Although Mr. Paul says "I gave all the facts" about the incident, Mr. Hamilton did not recall Mr. Paul also advising them that it had been he who had put the oil and grease on Mr. Elejel's car and that he had also kicked Mr. Elejel in the course of the events.

20. On September the 19th, Mr. Plancke had a meeting with the Company in an attempt to discuss Mr. Elejel's grievance. At that time, the Company took the position that the grievance had not been filed according to the time limits in the collective agreement and that it was improperly filed because it had not been signed personally by Mr. Elejel. Thus, the Company refused to discuss the case with Mr. Plancke.

21. The Union's local meeting was then held on September the 24th. The Local is made up of 20 plants which have approximately six to eight hundred members. The employees from the Company make up a bargaining unit of approximately twenty. At this particular Local meeting thirty or forty people were in attendance.

22. Mr. Elejel attended this meeting after receiving a call from Mr. Paul advising him that his case would be discussed at that meeting. Mr. Elejel appeared at the meeting with his lawyer and with his son-in-law who was to act as the interpreter for Mr. Elejel and the lawyer. Mr. Hamilton was the chairman of the meeting. At the outset, Mr. Hamilton noticed that there were non-union members present. Mr. Hamilton was not prepared to proceed in the presence of non-union members and asked such people to leave. After Mr. Elejel's lawyer explained the purpose of his presence and that of the son-in-law, Mr. Hamilton changed his mind and allowed the son-in-law to remain as the translator but insisted that the lawyer leave. The lawyer then did leave, instructing the son-in-law to take notes of everything which transpired and to prevent Mr. Elejel from speaking because of the pending criminal charges.

23. When the time came for the meeting to discuss Mr. Elejel's grievance, Dan Paul addressed the membership on behalf of the Local. There is considerable controversy over what was said by Mr. Paul and this evidence must be explored in detail. Mr. Paul said "I gave all the details" of the incident. He says he advised the membership that Mr. Elejel had two previous warnings for violence, that the dismissal was for violence, and that the grievance had been filed out of time. Thus, Mr. Paul advised the membership that they would likely lose at arbitration. Mr. Paul said "It's my job to state those things." Mr. Elejel's version of the meeting is somewhat different. However, it is to be remembered that his command of the English language is far from perfect and that he was dependent upon his son-in-law to translate the incidents of the meeting. What Mr. Elejel claims occurred was that Mr. Paul described the incidents of August the 29th. Further, Mr. Paul mentioned the incident with the salt shaker and that Mr. Elejel had received a suspension for that. He also recalls Mr. Paul mentioning that Mr. Elejel had circulated a petition to get rid of the Union. Mr. Elejel denies that this was the case and says "I am illiterate, how do you expect me to make such a thing?" The most detailed recollection of the meeting came through Mr. Elejel's son-in-law, Arif Haidar. He recalls Mr. Paul saying that Mr. Elejel was a "violent person" and "had a history of violence." Further, he recalls Mr. Paul saying that Mr. Elejel had thrown a fan at a woman and "always throws stuff" and had been suspended for this. Mr. Haidar also recalled Mr. Paul saying that he had hesitated to file a grievance on behalf of Mr. Elejel but that the Company had fired Mr. Elejel without regular procedures. Further, Mr. Elejel had started a petition

against the Union. Mr. Paul denies mentioning any hesitancy, any irregular proceedings by the Company or anything about such a petition. Mr. Hamilton had no recall of these things being mentioned. Regarding the incident itself, Mr. Haidar recalls Mr. Paul saying that Mr. Elejel had found oil on his car, but Mr. Paul had said "I'm not going to say how it got there." Further, he recalls Mr. Paul telling the membership that Mr. Elejel had gotten the wood from his car and waited for employees to get out of work and had then started to "club everyone in the parking lot" as they came out. Mr. Hamilton says that he never heard anything about such clubbing and Mr. Paul denies saying all of that adding "I never referred to it as a club." However, it is interesting to note that throughout his testimony, Mr. Paul did refer to the stick of wood as a "club".

24. What is undisputed about the meeting is that it was Mr. Paul who made the motion to the membership that they vote not to take Mr. Elejel's case to arbitration. In the course of discussion about this, Mr. Elejel's son-in-law addressed the membership by advising them that Mr. Elejel was a father of eight and grandfather and was not a violent person. Thus he could not have done these acts. He mentioned something about Mr. Elejel not being allowed to say anything about the merits of the case because of the criminal charges pending. However, this was not understood by other people. Thus, nothing was said to the membership about Mr. Elejel's version of the events. A vote was then held and it must be concluded that the membership voted unanimously to decline to take the case to arbitration. It should be added that there is no evidence that Mr. Elejel was in any way restricted by anyone in the Union from speaking or appealing to the membership. However, on his own lawyer's advice, he did not defend himself at that meeting.

25. The incident of the fan mentioned to the membership and mentioned above in paragraph 23 bears some further elaboration. The evidence is clear that Mr. Elejel received a suspension on July 3, 1984 for throwing a fan at Cathy Cowie. Again, much evidence was presented by both parties regarding this incident with Mr. Elejel alleging that the allegations against him were "all lies." However, the suspension was never grieved and it is not now appropriate to pass judgment on the merits of the suspension or to determine exactly what happened in that incident. It is too late for the complainant to ask the Board to reopen that issue especially since no allegation was made that this incident involved a breach of section 68. Thus, the Board must accept that Mr. Elejel did receive a suspension for throwing a fan at Ms. Cowie. However, it is also interesting to note that at the time of the incident, Dan Paul assisted Cathy Cowie in her complaint to management about Mr. Elejel and no one from the Union spoke to management on Mr. Elejel's behalf.

26. The last fact which rounds out the sequence of events regarding this case is that Mr. Elejel was taken to trial in the County Court in January of 1985 on the charge of "assault with a weapon" against John Wilding. The trial was heard before a jury. Marie Soucey, Carmella Vecchio, Dan Paul, John Wilding and Mr. Elejel all testified. At the conclusion of the trial, the jury reached a verdict of not guilty. Almost immediately thereafter, this complaint was filed before the Board.

27. Having discussed the evidence that was presented, it is also appropriate to comment upon evidence which the Board decided to exclude. During the cross-examination of Mr. Elejel, the Union sought to question Mr. Elejel about an incident which occurred four years ago allegedly involving Mr. Elejel with violence against another employee. An objection was raised by counsel for the complainant. On questioning from the Board, counsel for the

Union admitted that this incident was not raised or discussed at the Union meeting of September the 25th nor was it part of the information or considerations used by the Union in making its decision not to take the case to arbitration. Thus, the Board ruled that the evidence was inadmissible. If it had any possible relevance to the issues of the case, that relevance could only be marginal and such relevance was far outweighed by the potential prejudice that such evidence could engender. Thus, the evidence was ruled inadmissible.

28. In addition, during the examination-in-chief of Marie Soucey, counsel for the complainant tried to adduce evidence of harassment that Ms. Soucey had received from the Union Executive, especially harassment by Dan Paul. On objection from the Union, the Board ruled that this evidence was inadmissible as it bore no relevance to the course of conduct that the Union may or may not have had towards the complainant.

29. Comment must be made upon the credibility of the witnesses. The most lengthy and crucial witnesses were Mr. Elejel and Mr. Paul. I must conclude that neither of them was completely credible. Mr. Elejel denied that he had told jokes in the plant. He gave his lack of ability in English as one reason and his religious convictions prohibiting him from telling sexual jokes as the other reason. However, Mr. Elejel's own witness, Marie Soucey, volunteered that Mr. Elejel "used to joke a lot." Marie Soucey was a completely credible and forthright witness. Thus, Mr. Elejel's credibility was weakened by his own case. Further, when he denies hitting Dan Paul in the face after finding grease on his own hand, Mr. Elejel said "I opened my hands and oil came onto his face." Yet, Mr. Elejel claims this did not come from hitting Mr. Paul. This explanation simply cannot be believed. Thus, not all of Mr. Elejel's case can be accepted as factual where he depends only on his own evidence.

30. Similarly, Mr. Paul's credibility cannot be accepted as complete. His demeanour and testimony can only be described as evasive. After reluctantly saying that he did kick Mr. Elejel in the seat of his pants he said "so I'm told." He then admitted that he did make the kick but added "I'm not sure if the boot made contact." However, the witnesses called by the Union to support Mr. Paul who saw the incident all said that it was quite clear to them that Mr. Paul did in fact hit Mr. Elejel with the kick. Mr. Paul's unwillingness to be candid about that incident was typical of his evasiveness. Further, his cross-examination brought out a contradiction about his version of what happened with Mr. Wilding and the lunch pail in the testimony at the criminal trial and at these proceedings. In addition, he contradicted his own witness Cathy Cowie with regards to how far he was away from her during the incident when the fan was thrown. Mr. Paul says he was twenty feet away from the incident whereas Ms. Cowie said that she had to go to "find him" and that he was "quite a distance" away at his own work station. Because of these incidents and his demeanour, Mr. Paul's evidence cannot be accepted as completely trustworthy.

31. Comment must also be made on the evidence of Darlene McAleer. Except where her evidence was cited above, it must be concluded that her evidence was completely unreliable. The demeanour she presented to the Board was that of a person who was readily willing to colour the truth and evade the truth wherever necessary. When she was asked in cross-examination if she knew who had originated the petition regarding Marie Soucey, Ms. McAleer denied such knowledge. This in itself would not be disturbing except for the fact that when saying this she did it with a smirk and a smile which strongly suggested that she knew full well who had originated the petition. In addition, Carmella Vecchio said that she was called by Ms. McAleer on the telephone regarding the petition and asked to sign it.

Ms. McAleer was not asked to deny this in examination in chief and it was not raised in cross-examination. Thus, the evidence of Ms. Vecchio must stand. It shows that Ms. McAleer was involved in the petition herself. This is a fact which she flatly denied. In addition, Ms. McAleer contradicted the Union's case in several minor aspects and gave testimony that no other Union witness offered which again shows her willingness to present her own version of the truth. For example, she denied that she had seen Dan Paul put the oil and grease on Mr. Elejel's car. However, unknown to Ms. McAleer because of the exclusion of witnesses, Mr. Paul had already told the Board that Ms. McAleer had seen him put the oil and the grease on the car herself. Further, Ms. McAleer described the incident between Mr. Wilding and Mr. Elejel as a "jostle". However, no other witness' description of that incident is in terms that come close to what anyone could characterize as a jostle. Ms. McAleer was presented by the Union to try to establish an incident on August the 28th allegedly involving Mr. Elejel and the same stick as was used on August the 29th. However, because of the Board's assessment of Ms. McAleer and her testimony, her evidence regarding the alleged incident on August the 28th is completely rejected.

32. Having mentioned the difficulty with some of the witnesses, the Board should also indicate that it found the evidence of Marie Soucey, Carmella Vecchio, Carl Hamilton, and Gordon Plancke to be entirely credible. Their testimony was all characterized by apparent honesty, a sincere attempt to state their position accurately and an evident desire to be candid with the Board. In addition, their evidence was all internally consistent. The Board is also accepting the evidence given by John Wilding except with regard to his version of the events after he was hit on the head by Mr. Elejel. Mr. Wilding's recall of these events does not accord with the evidence of other witnesses. The Board concludes that this contradiction is not the result of an attempt to mislead the Board but rather, the result of his confusion following the blow to his head.

Argument

33. Counsel for the complainant argued that the Union acted arbitrarily, discriminatorily and/or in bad faith by refusing to proceed to arbitration with Mr. Elejel's case. It was submitted that the key to this case was the fact that the incidents giving rise to the discharge involved two of the Union leaders, namely the plant chairman and the Union steward. Further, the incident on August the 29th was triggered by the plant chairman himself putting the grease and oil on Mr. Elejel's car. It was the same person who assumed the carriage of Mr. Elejel's case when it was brought before the Union Executive and the Local meeting. Thus, at all times, Mr. Paul was acting both as the instigator of the incident and in his capacity as plant chairman. Because of this, counsel for the complainant says that Mr. Paul was in the position of an impossible conflict of interest placing the Union in such a conflict which resulted in the Union inevitably breaching its duty towards the complainant. It was submitted that Mr. Paul's involvement on and after August the 29th taints any acts that the Union undertook on behalf of Mr. Elejel.

34. Regarding the incidents of August the 29th themselves, counsel for Mr. Elejel submitted that the importance of the evidence is that it illustrates the fact that the Union official, Dan Paul, despite his capacity as plant chairman, was willing to put oil and grease

on a bargaining unit member's car and thus act completely improperly. Further, it was submitted that the facts should be found to establish that Mr. Elejel acted in self-defence and thus should not have been discharged for his conduct.

35. Regarding the evidence about the events from and after March of 1984 until August, counsel for the complainant said that they establish a course of harassing conduct against the complainant as a result of his refusal to sign a petition against Marie Soucey. It was said that even if the complainant brought some of it upon himself, none of it justified the way he was treated. Further, it was offered to place the incident of August the 29th in its proper context and explain the animosity between the complainant and Mr. Paul.

36. Counsel for the complainant asked the Board to find that the Union had breached its duty of fair representation. The relief requested was that the complainant be reinstated in his employment with full compensation. In the alternative, the Board was asked to refer the matter back to arbitration with an order entitling the complainant to retain independent counsel at the Union's expense. Further, an award of compensation for lost wages was requested in any event, or that it be contingent on the arbitration award. Finally, costs of these proceedings are requested. Counsel referred the Board to the following cases: *Canadian Merchant Service Guild v. Gagnon, et al*, (1984), 9 D.L.R. (4d) 641 (S.C.C), *The Corporation of the Town of Oakville*, [1984] OLRB Rep. May, 731, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338, *Leonard Murphy*, [1977] OLRB Rep. March 146, *Ford Motor Company of Canada, Limited*, [1973] OLRB Rep. Oct. 519 and *Re Tandy Electronics Ltd. and United Steelworkers of America, et el*, (1980) 30 O.R. 29 [Div. Ct.].

37. Counsel for the Union stressed that in embarking on a review of the case, the Board should act in accordance with the principles set out in the *Dufferin Aggregates* case, [1982] OLRB Rep. Jan. 35. In other words, the Board was asked to review the matter as would a court on judicial review. The Board was directed to consider the situation at the Union meeting on September the 25th as the key to the case. Counsel for the Union argued that the evidence is that this Local decides what case goes to arbitration through the democratic process of having a membership vote. Thus, it was the Local's decision and that decision ought not to be lightly interfered with.

38. The Union argued that its conduct at the meeting was also entirely proper. The historical reasons for excluding anyone other than local members at Union meetings were recited. It was argued that the Union properly excluded the lawyer from the Union meeting and that no union would want this Board to suggest that lawyers must be allowed to participate in the internal affairs of a union at any individual member's request. In any event, it was argued that in the complainant's particular case he was the victim of poor legal advice from his lawyer because it was this advice which led him to fail to respond to the allegations made against him by Mr. Paul. It was suggested that this failure to respond inevitably resulted in the membership feeling that there could not have been any defence that could be made for Mr. Elejel. Thus they voted against it. It was stressed that it ought not to be the responsibility of the Union if Mr. Elejel remains silent at the meeting.

39. Further, it was stressed that Mr. Elejel's own failure to request that a grievance be filed or to process a grievance on his own authored his own misfortune. However, once the position was made clear to the Union that he wanted a grievance to be processed, it was argued

that the Union, at Mr. Plancke's instigation, acted with due dispatch. In any event, it was also argued that anyone who had witnessed the incident on August the 29th would have been entitled to conclude both that Mr. Elejel had been fired for cause and that he had accepted the discharge. It was argued that Mr. Elejel's conduct was such that one would have to conclude that he acted with violence. This, coupled with his "history of violence in the work place," was said to justify the Union's decision not to proceed to arbitration.

40. Regarding the complainant's submission about the conflict of interest, counsel for the Union said that while there was no denying that Dan Paul was involved in the incident, his involvement "shrinks in importance" because of the fact that it occurred while Mr. Elejel was allegedly reaching for his stick. Further, the key element of that incident was the exchange between Mr. Elejel and Mr. Wilding.

41. Because of all this, the Union asked that the complaint be dismissed. In the alternative, the Board was asked to remit the issue back to the Local meeting for further consideration in order that this Board not diminish the trade union's practice of dealing with decisions such as this in a democratic way. The Union cited the case of the *Four Seasons Hotels*, [1984] OLRB Rep. Oct. 1406. In the event that any compensation was awarded, the Union asked that the date for calculating the compensation should not begin running until the time of the complaint, being January the 28th, 1985 because there was a four-month delay after the cause of action arose. It was suggested that the complainant had awaited the outcome of his criminal trial on January 14 and 15, 1985 before laying the complaint. Thus, the Union argued that it ought not to be responsible for the complainant's decision to await the outcome of his criminal trial. In addition, while the Union did not question the complainant's right to choose his own counsel in the event that the matter is remitted to arbitration, the Union did stress that this ought not to be at the Local's expense. It is the Local's practice to use an experienced leader of the Union for arbitrations and it was argued that it ought not to be put to the expense of hiring someone other than their own person. Finally, it was argued that this is not an appropriate case for costs to be awarded against the Union.

The Decision

42. The complainant alleges that the Union's conduct here amounts to acts which are arbitrary, discriminatory or in bad faith and that is contrary to section 68 of the Act. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

43. In order for this complaint to succeed, the onus is on the complainant to establish on the balance of probability that the trade union acted in a manner that was arbitrary, discriminatory or in bad faith and thus contrary to section 68 of the Act. The function of the Board in determining whether section 68 has been violated is not to second guess the Union or substitute the Board's opinion as to what the Union ought to have done. The function of the Board has been set out in *Ford Motor Co. of Canada*, [1973] OLRB Rep. Oct. 519:

This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measure and solutions that have gained acceptance within that community.

44. In order to find arbitrariness, this Board would have to conclude that the Union failed to direct its mind to the merits of the complainant's grievances or failed to enquire into or act upon available evidence or conduct any meaningful investigation to obtain the information to justify its decision. Alternatively, arbitrariness could be established if the complainant could show that the Union acted on the basis of irrelevant factors or principles or displayed an attitude that was indifferent, capricious or non-caring towards the complainant. (See *I.T.E. Industries Limited*, [1980] OLRB Rep. July, 1001.)

45. To show bad faith, the complainant would have to establish hostility, ill will, dishonest dealing, an attempt to deceive or a refusal to process the grievance for sinister purposes. (See *Chrysler Canada Ltd.* [1979] OLRB Rep. July 618.)

46. The Board has set out the test for discrimination in *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143 as follows:

The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for doing so. To avoid acting in a manner that is discriminatory, the union requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

47. With these principles in mind, we can now turn to the assessments of the facts of this case. The Board shall first address the conduct prior to August 29, 1984. This conduct allegedly involves a course of harassment by the Union against the complainant. However, as must be apparent from the recital of the evidence above, the complainant and his witnesses are unable to come close to proving that any of the particular acts of harassment which may have occurred were carried out by or on behalf of the Union nor can many of the incidents be traced to individuals. Mr. Elejel does not know who carried out the "pranks" of hiding his goods. Further, the aggravation he endured as a result of having the lights turned off against his wishes in the lunchroom can only be traced to individuals acting in their personal capacity. There is no evidence to link that to the Union. However, the evidence is clear that Mr. Elejel was treated very differently after he refused to sign the petition against Marie Soucey. The evidence is also clear that it was the Union's supporters who signed and assisted in the circulation of that petition. Mr. Paul admitted himself in his testimony that the employees had a change of attitude against Mr. Elejel after his refusal to sign the petition. However, Mr. Paul hastened to add that there was no change "so far as I was concerned." The Board must conclude that the circulation of the petition divided the employees into two opposing camps, that is, those who supported the petition and thus the Union, and those who did not. Thus, Mr. Elejel was fully justified in his own belief that individual supporters of the Union did harass him because of his refusal to co-operate with them. However, this Board cannot conclude that he has established a course of conduct by the Union against him prior to

August 29, 1984. What has been established beyond doubt by Mr. Elejel is that the pranks and harassment against him created a dreadful atmosphere in the work place. Even if Mr. Elejel was guilty of inciting religious or political arguments and discussions in the lunchroom, and even if he was the instigator of sexual jokes, nothing can justify the fact that his fellow employees began to play pranks upon him and hurled insults at him such as "P.L.O. Go home", "camel jockey", "pig" and "Paki." This would create an absolutely impossible working environment for anyone. The fact is that this behaviour was well known to the Union, as admitted by Mr. Paul, and it is clear that Mr. Elejel made several complaints to the Company. It is astonishing that nothing remedial was attempted by the Union or the Company other than a simple and quiet notice on the bulletin board to quell such behaviour. Thus, it is certainly not surprising that this atmosphere erupted into a terrible incident on August the 29th.

48. Exactly what happened on August 29th is not the issue for this Board to decide. What is important is how the Union responded to it. The Board agrees with counsel for the Union that the key to this case is the Union's conduct with regard to the discharge and ultimately its conduct at the meeting on September 25th.

49. Although the complainant did not file or ask for a grievance to be filed immediately after his discharge, he cannot be faulted for this under these circumstances. One must remember that the incident that gave rise to his discharge involved both the Union's plant chairman and one of its stewards. While there was a third steward, Grace Fletcher, who is independent of all the incidents and circumstances raised in this case, one cannot hold it against Mr. Elejel that he did not approach her. While he would have been well advised to have approached her and asked for assistance, the Board is mindful of the fact that the conduct of Mr. Wilding and Mr. Paul led Mr. Elejel to believe that he could get no support or assistance from the Union. Thus, his choice of retaining a lawyer and having the lawyer contact the Union for him was, under all the circumstances, a justifiable course of action. This case is similar to that of *Toronto Hydro Electric System*, [1980] OLRB Oct. 1561 at paragraphs 10 and 11.

50. Once the Union was contacted by Mr. Elejel's lawyer and put on notice of the fact that it was being held responsible for Mr. Elejel's discharge, Mr. Plancke acted responsibly and professionally. He instructed Mr. Paul to file a grievance immediately. However, it must be noted that Mr. Paul neglected to file the grievance for a further five days. The collective agreement between the Company and the Union carries mandatory time periods for the filing of a grievance and an explicit waiver of section 44(11) of the *Labour Relations Act*. Thus, no relief from the mandatory time limits can be provided by an arbitrator. While it was not the Union's argument at this hearing that the grievance had been filed late, it was certainly the position of the Company towards the Union in September of 1984 that the grievance was filed late. While this Board need not determine the timeliness of the filing of the grievance or whether the grievance would have been timely had it been filed on or about September the 13th as Mr. Plancke instructed, Mr. Paul's neglect in responding promptly must be considered as a significant factor in this decision despite the fact that the weekend intervened.

51. Setting aside the conduct of Mr. Paul, this Board finds no breach of the Union's duty towards Mr. Elejel with regard to the conduct of Mr. Plancke on September the 19th in his meeting with the Company or on the part of the Union Executive in its meeting of September the 17th. On each of these occasions, the rights of the complainant were observed and respected.

52. However, the Board is forced to conclude that the conduct of Mr. Paul from and after August 29th, 1984 was such as to place the Union in a position that it could not and did not fulfil its duty of fair representation to the complainant. First, Mr. Paul's conduct must be put in its proper context. It is to be remembered that he was a signatory to a petition designed to violate the seniority rights of Marie Soucey in April of 1984 despite his role as plant chairman and therefore leader of the Union. Again, despite this role, it was he who poured grease over the car of one of his union brothers, the complainant, on August 29th simply because he believed that Mr. Elejel had done it to him the day before. However, there was no evidence that this was the case. Further, this same union leader was observed on several occasions making racial taunts to the complainant. The inescapable conclusion from this evidence is that there was a high degree of animosity between Mr. Paul and Mr. Elejel and that the animosity was mutual. Further, Mr. Paul cannot be seen as a person whose union position and responsibilities prevented him from acting as he chose towards individuals and in a way that is uncharacteristic of a person who respects his professional union responsibilities.

53. The incident in the parking lot after work on August the 29th and Mr. Elejel's hitting of Mr. Wilding resulted in Mr. Elejel being discharged. On August the 29th, nothing was said to the Company on Mr. Elejel's behalf by a Union representative. Instead, Mr. Paul spoke to Howard Grieve on Mr. Wilding's behalf. Later, when Mr. Paul was discussing the facts of the incident with Mr. Hamilton, Mr. Plancke or the Union Executive, Mr. Paul never mentioned his own involvement with the incident of August the 29th nor that he had instigated it by putting the oil on Mr. Elejel's car. When Mr. Hamilton was asked whether he would have expected Mr. Paul to have advised him of all the facts Mr. Hamilton candidly responded "I would hope so." But the fact remains that Mr. Paul did not advise them of all the facts nor of the history of animosity in this situation. However, up to the point of the meeting of the Local on September the 25th, it must be said that no real harm was done to Mr. Elejel by the Union because up to that point the Union had protected Mr. Elejel's interests as best as possible under the circumstances.

54. However, the circumstances changed at the Local meeting on September 25th. The Board finds as a fact that Mr. Elejel was given a full and fair opportunity to speak. The Board finds no fault with the Union for conducting its internal affairs in the absence of non-union members and deciding to exclude a lawyer who wished to speak on Mr. Elejel's behalf. This Board does not need to concern itself with such internal affairs in deciding whether there has been a breach of section 68 of the Act.

55. However, Mr. Paul's involvement at this meeting is another matter. It must be remembered that the people in attendance at the Local meeting came from a number of other plants. Very few in attendance could have had any personal knowledge of the events leading up to Mr. Elejel's discharge. Thus, they were completely dependent upon the synopsis of the events and the explanations presented to them by Mr. Paul in his capacity as plant chairman. The Board has concluded that in determining what occurred at that meeting, the evidence of Mr. Haidar is to be preferred over the evidence of Mr. Paul. We have already commented on Mr. Paul's credibility. But further, Mr. Haidar's evidence was the most detailed and was supported by notes which he made immediately after the meeting. His conviction regarding the meeting was not shaken in the able cross-examination. No other witness had as extensive a recall as Mr. Haider. However, even if Mr. Paul's version of the meeting is to be accepted

in full several key facts emerge. First, Mr. Paul did not advise the membership of his own personal involvement in the events that led up to the incident on August the 29th or the incident itself. He did not admit that he had greased Mr. Elejel's car or that he had been involved in the initial violence on that day. Thus, unknown to the Local, Mr. Paul was both an actor involved in the incident and a person attempting to be an advocate without revealing his dual role. His position is analogous to one who tries to be a prosecutor, a witness, and a co-defendant at a trial. Thus, he is in a position of a complete conflict of interest. It is impossible for him to be objective as to his role as the plant chairman in presenting the facts because of his complete involvement in the incident. This lack of objectivity and complete conflict inevitably cast grave doubt upon the picture that was presented to the membership to assess upon their vote.

56. This Board wishes to encourage the democratic process of a union wherever possible. However, where a vote is taken on a decision as to whether or not to proceed to arbitration, that vote can only be "democratically" made when it is based upon a fair and objective presentation of the evidence. The membership of this union was prevented from obtaining such information because of the conflict of interest of Dan Paul when it was presented.

57. It is not a defence for the Union to say that Mr. Elejel could have spoken on his own behalf. Once Dan Paul undertook and fulfilled the role of prosecutor despite his conflict of interest, the democratic process of the Union was completely tainted. Mr. Elejel's silence cannot undo that taint.

58. An employee does not have an absolute right to expect that his grievance will be taken to arbitration. The union is fully entitled to properly weigh all aspects of grievances, even including discharges, to determine whether or not the union ought to undertake the expense of the route of arbitration. In making the decision, the union is entitled to exercise a discretion but must do so in a manner that is not arbitrary, discriminatory or in bad faith. Mr. Paul's lack of honesty to his own Union members left them in a position that the decision was not based on all the relevant facts. Further, Mr. Paul's lack of honesty with the membership and with regard to Mr. Elejel must be the responsibility of the Union as a whole. Mr. Paul's animosity towards Mr. Elejel must be seen to be such that Mr. Paul could not and did not act in good faith with regard to Mr. Elejel's circumstances. Again, Mr. Paul's lack of good faith must be accepted by the Union as its responsibility. Finally Mr. Paul's conflict of-interest deprived both Mr. Elejel and the Local itself of the opportunity to have the full and proper facts presented to form the basis of the decision. This amounts to arbitrary, discriminatory and bad faith conduct. See *Windsor Western Hospital*, [1984] OLRB Rep. Nov. 1643.

59. As a result of the foregoing, the Board concludes that, despite the professional and proper treatment given to Mr. Elejel by the Union Executive, Mr. Hamilton and Mr. Plancke, the Union must accept the responsibility for the conduct of the plant chairman Mr. Paul. Mr. Paul's conduct must be characterized as discriminatory, arbitrary and in bad faith as against Mr. Elejel with regard to his involvement in the Union's decision not to proceed to arbitration.

60. This raises the question of the appropriate remedy. Section 68 does not give a successful complainant the automatic right to have his grievance arbitrated. As the Board has indicated in *Bedard Girard Ontario*, *supra*:

Section 68 does not confer upon a successful complainant an automatic right to have his grievance arbitrated; where a union fails to take a grievance to arbitration and it is not obvious that arbitration is necessary, the Board may direct the union to reprocess the grievance from the point at which fair representation was denied.

61. Given the democratic structure of this Union and the Board's desire to encourage such a structure, it would normally be preferable to refer a case back to the Union to reconsider. However, in this case, the Board must conclude that a remittance of the complainant's situation back to the local membership would not be an effective remedy. The damage, or the potential damage done by Mr. Paul in his presentation to the Union membership cannot be undone by sending the matter back to the membership and hoping that they will treat the matter anew. It would be the equivalent of an appeal court sending a case back for a new trial before the same jury after declaring a mistrial. The unfairness created in the first proceeding could not be erased in the minds of the jury. Thus, the Board concludes that the only effective and fair remedy in the circumstances is to direct the Union and the Company to arbitrate Mr. Elejel's grievance forthwith, notwithstanding the time provisions in their collective agreement.

62. The Board also concludes that this is an appropriate case to order the Union to engage an independent counsel that is jointly chosen by the complainant and the Union to represent the Union in the arbitration of the grievance. This decision is made not because of any concern over the Union representative's ability to present a case effectively. Instead, the order is made because unless an independent counsel is engaged, the Union would be unable to effectively present an argument on behalf of Mr. Elejel given the position it has had to take during these proceedings. Precedent for the Board making orders such as these can be found in *Leonard Murphy*, [1977] OLRB Rep. March 146, *Consumers Glass Co. Ltd.*, [1979] OLRB Rep. Sept. 861, *The Corporation of the County of Hastings*, [1979] OLRB Rep. Nov. 1072 and *Bedard Girard Ontario*, *supra*.

63. Finally, an award of damages against the Union in this case should be contingent on the success of the arbitration given that the complainant cannot be shown to have suffered financially from the Union's violation unless the discharge ultimately succeeds.

64. The Board therefore orders, notwithstanding the provisions of the collective agreement binding upon the parties hereto,

- (1) that the parties arbitrate forthwith the discharge grievance of Mr. Elejel;
- (2) that in the event that the grievance is successful at arbitration, the Board retains jurisdiction to deal with the issue of compensation that may arise up to the date of this award;
- (3) that the Union engage and pay a counsel, jointly chosen by the complainant and the Union, to represent the Union in the arbitration of Mr. Elejel's grievance.

65. The Board remains seized of this complaint for the purpose of resolving any matter arising out of the implementation of the above order.

0336-84-R United Food and Commercial Workers International Union, Applicant, v. **Famz Foods Limited**, Respondent, v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88 and Canadian Union of Restaurant and Related Employees, Intervener #1, v. Canadian Union of Restaurant and Related Employees, Intervener #2, v. Group of Employees, Objectors

Certification - Petition - Practice and Procedure - Changes in wishes of employees after terminal date not grounds to extend terminal date to entertain untimely petition - Fact that final disposition of application took long time not reason to extend - Incumbent initially intervening and opposing application - But withdrawing intervention after considerable period - Certificate issued without vote in circumstances

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *F. W. Murray* and *L. C. Collins*.

APPEARANCES: *A. M. Minsky, Q.C.*, and *K. Corporan* for the applicant; *Allen A. Morrow* and *Wanda Paszkowski* for the respondent; *Alick Ryder, Q.C.*, *Tom Rees* and *James Whyte* for the interveners; and *C. J. Abbas*, *Dave Callum* and *Sue Mitchell-Buxton* for the objectors.

DECISION OF THE BOARD; June 12, 1985

1. This is an application for certification. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* ("the Act"). The parties agree, and the Board finds, that

all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1426 London Road, in the City of Sarnia, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess,

constitute a unit of employees of the respondent appropriate for collective bargaining. The contested issues addressed in this decision are whether the Board should extend the terminal date by approximately one year to permit consideration of the objectors' petition when determining, in the exercise of its discretion under section 7(2) of the Act whether to direct a representation vote and whether, quite apart from the petition, the circumstances warrant exercising that discretion in that manner.

2. This application for certification was filed on May 3, 1984. The Registrar fixed May 17, 1984, as the terminal date for this application, listed it for hearing June 4, 1984 and gave notice of the application and hearing to the respondent employer. The material sent to the employer included notices to employees of the application and of the hearing date, in Form 6. The employer was directed to post those notices immediately, and to complete and send to the Board a return of posting card to confirm the posting of those notices. The card returned by the respondent indicates that the notices to employees were posted at 4:00 p.m. on the 14th day of May, 1984.

3. The notice to employees advised them of the date of application, the bargaining unit applied for, the terminal date fixed for the application and the date on which and time and place at which the application would be heard by the Board. The notice also contained the following provisions:

4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

5. The statement of desire must be,

- (a) received by the Board *not later* than the terminal date shown in paragraph 3; or
- (b) if it is mailed by *registered mail* addressed to the Board at its office, 400 University Avenue, Toronto, Ontario, M7A 1V4, mailed *not later* than the terminal date shown in paragraph 3.

6. A statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.

7. Any employee, or group of employees, who has informed the Board **in writing** of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT FURTHER NOTICE AND WITHOUT CONSIDERING THE STATEMENT OF DESIRE OF ANY PERSON WHO FAILS TO ATTEND.

No statement of desire was filed by any employee prior to the terminal date.

4. The respondent filed a Reply, and the interveners filed Interventions. The respondent and interveners took the position that the respondent was bound by a collective agreement (the "SCEA agreement") between the Canadian Union of Restaurant and Related Employees ("CURRE") and the Swiss Chalet Employers' Association ("SCEA"). That collective agreement was not due to expire until November 8, 1984. The respondent and intervener took the position that this application was, therefore, untimely. Intervener #1 ("Local 88") took the position that it should be declared successor to the bargaining and collective agreement rights of CURRE, by reason of a purported merger of CURRE into Local 88 on January 13, 1984.

5. No employee or group of employees sought to intervene in this application when it first came on for hearing on June 4, 1984. The parties then present agreed to consolidate

the hearing of certain preliminary matters in this application with the ongoing hearing of similar issues in other applications then before the Board. The nature of those common issues, the manner in which they were tried and the Board's determination of those issues are described in decisions herein dated September 12, 1984, and February 18, 1985. The finding of the Board (differently constituted) with respect to this application was that while CURRE did have bargaining rights with respect to the employees of the respondent at the subject location, the respondent was not bound by the terms of the SCEA agreement at the time this application was filed, and the application was, therefore, timely. In paragraph 43 of its decision of February 18, 1985, the panel which dealt with those preliminary issues directed that the Registrar list this application for further hearing and indicated that it was not seized of any of the remaining issues in this application. The Registrar listed this and a number of other applications affecting Swiss Chalet restaurants for hearing by the Board on May 3, 1985.

6. On April 4, 1985, the applicant and interveners entered into a settlement concerning certification applications outstanding with respect to a number of Swiss Chalet restaurant locations in the Province of Ontario. A written memorandum of the settlement was filed with the Board. Insofar as it affected this application, it provided that CURRE and Local 88 would request leave of the Board to withdraw their interventions herein. By letter dated April 11, 1985, counsel for CURRE also advised the Board that his client abandoned its bargaining rights with respect to employees at a number of locations, including the location affected by this application.

7. On April 25, 1985, the Board received an undated "petition" signed by seventeen persons, under cover of a solicitor's letter dated April 23, 1985, the relevant portions of which are as follows:

Re: File No. 0336-84-R

Enclosed herein please find a Petition signed by a group of employees of Famz Foods Ltd. working at its Swiss Chalet Restaurant located at 1426 London Road, Sarnia, Ontario.

We are advised that the UFCW is currently applying for certification as bargaining agent for this said group of employees and that the hearing date for the application is on May 3rd, 1985. We have been instructed to submit the said Petition to the Ontario Labour Relations Board in order to express their objection at the said hearing to representation by any trade union.

The employees have been kept in the dark with respect to the status of the dispute between the UFCW and CURRE and have only recently discovered that the hearing date is on May 3rd, 1985. Accordingly they have not had adequate time in which to obtain counsel with any expertise in labour matters. We wish to advise that we will request an adjournment of the May 3rd, 1985 hearing in order that the said group of employees may be fairly represented in this matter.

8. The objecting employees were represented at the Board's hearing in this matter by counsel with experience in labour relations matters and proceedings before this Board. Counsel did not press the request for an adjournment. He asked that the Board give his clients' petition the same affect as it would give to a timely petition, even though this petition had been filed long after the terminal date. He emphasized that the delay in disposing of this application had been the result of inter-union rivalry, not employer obstruction, and submitted that in those

circumstances the Board's usual concerns about delay should not apply. He argued that as certification proceedings are concerned with the right of employees to be represented by the trade union of their choice, the Board should be prepared to consider a petition evidencing changed wishes where, as he argued, both participant unions by their actions may have cooled the employees' desire for union representation.

9. We are not prepared to extend the terminal date in this case. To do so for the reasons advanced would be inconsistent with the certification process contemplated by the *Labour Relations Act*.

10. The certification process and the significance of employee petitions in that process were described in *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138:

15. The object in certification proceedings is to determine whether a majority of employees in a unit appropriate for collective bargaining wish to be represented by the applicant trade union in their relationship with their employer. Important considerations underlie the Legislature's choice between membership evidence and the representation vote as the means of ascertaining majority wishes (see Weiler, P.C., *Reconcilable Differences*, (Carswell 1980), at pp. 37-49 for a review of these considerations). The Legislature's choice of membership evidence as the primary basis for the certification decision recognizes the obvious correlation between a desire for trade union representation and the act of joining a trade union. Any uncertainty inherent in equating the two is balanced by striking a confidence level of fifty-five per cent membership at and below which the appearance of majority support for trade union representation must be confirmed by a representation vote. When there is satisfactory evidence that over fifty-five per cent of the employees in the unit are members of the applicant, the Act authorizes certification without a vote. In giving the Board a discretion to order a vote even when over fifty-five per cent membership is demonstrated, the Legislature recognized the possibility that circumstances other than the number of members in the unit might, in a particular case, make trade union membership seem less reliable as a measure of an employee's desire for trade union representation. That discretion should be exercised in a manner consistent with the balance struck by the Legislature in emphasizing membership evidence as the method of determining employee wishes when membership support exceeds fifty-five per cent (see *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81 at 8; *Baltimore Aircoil Interamerica Corporation*, [1982] OLRB Rep. Oct. 1387 at 49; *Walbar of Canada, Inc.*, [1982] OLRB Rep. Nov. 1734 at 17.)

16. Rule 73 of the Board's Rules of Practice makes provision for the filing by employees of evidence of their objection to certification. *As with membership evidence, evidence of objection must be in writing, signed by the employee(s) and filed not later than the terminal date for the application (which is ordinarily the date set by the Board under section 103(2)(j) of the Act as the date as of which employee wishes are to be ascertained)*. Form 6, the Notice to Employees of Application for Certification, refers to such written evidence as a "statement of desire"; such documents are also commonly referred to as "petitions". Subsection 5 of Rule 73 sets out the Board's requirement that *viva voce* evidence be introduced at hearing as to the circumstances concerning the origination and circulation of the petition and the manner in which each signature thereon was obtained. The object of that inquiry is to determine whether the petition is a voluntary expression of the wishes of its signatories (see *Baltimore Aircoil Interamerica Corporation*, *supra*, 40.)

17. If a petition is shown to be the voluntary expression of the wishes of its signatories, the effect then given to it depends on the extent to which it casts doubt on the significance of membership in the applicant as evidence of the employees' desire for representation by the applicant. In the use of membership evidence to test employee wishes, an employee for whom no membership evidence has been filed is treated as though he or she opposes representation by the applicant. Therefore, a non-member's signature on the petition adds nothing to the assessment of support for representation by the applicant. However, the

signature on the petition of an employee who is a union member casts doubt not on that employee's status as a member, but on the otherwise reasonable inference that the employee's membership in the trade union reflects a desire for representation by that trade union in collective bargaining with his employer. The evidence of an employee's membership, that is to say, the inference which otherwise reasonably follows from proof that the employee is a member, is "clouded" in that sense by that employee's subsequent signature on a voluntary petition. If the membership evidence which remains unclouded would not alone be sufficient to support certification without a vote, then the Board ordinarily exercises its discretion under section 7(2) by ordering a representation vote. However, the petition speaks only to the desires of those who sign it; its existence casts no doubt on the desires of those who did not sign. One employee's change of heart cannot logically be given any more weight than another's consistent opposition. If the membership evidence which remains unaffected by the petition is itself otherwise qualitatively satisfactory and its quantity establishes that more than fifty-five per cent of the bargaining unit employees are members of the applicant, then faithfulness to the scheme of section 7 of the Act requires that the application be treated no differently than if the Board had received neither the petition nor the membership evidence thereby affected. In other words, such a petition is not considered "relevant" to the exercise of the Board's discretion under section 7(2) because it will not alone warrant a decision ordering a vote...

[emphasis added]

11. Both membership evidence and written evidence of employee opposition to certification must be filed with the Board on or before the terminal date, because of the strict limits Rule 73 imposes on the evidence which the Board may consider:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

(3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection (1) not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.

12. The terminal date referred to in the Board's Rules of Procedure derives its significance from subsection 7(1) of the Act, which requires that the Board assess the extent of trade union membership within the bargaining unit as of a time determined by the Board:

7.-(1) Upon an application for certification, the Board shall ascertain the number of

employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union *at such time as is determined under clause 103(2)(j)*.

[emphasis added]

Clause 103(2)(j) of the Act provides:

(2) Without limiting the generality of subsection (1), the Board has power,

- (j) *to determine the form in which and the time as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined;*

[emphasis added]

13. A terminal date is fixed by the Registrar when he first receives the application for certification, pursuant to section 2 of the Board's Rules of Procedure:

2. When an application is made, the registrar shall fix a terminal date for the application which shall be not less than five and not more than ten days, as directed by the Board, after,

- (a) the day on which the registrar serves the employer with the notice of application for posting, where they are served personally;
- (b) the day immediately following the day on which the registrar mails the notices of application to the employer for posting, where they are served by mail.

Employees learn of the terminal date when their employer posts the Board's Notice to Employees of Application and of Hearing in Form 6. Section 82(2) of its Rules of Procedure gives the Board the power to change the terminal date at any time after it is set by the Registrar. The panel which hears the application ultimately determines the time referred to in subsection 7(1) and clause 103(2)(j) of the Act: *R v. OLRB, Ex Parte Hannigan*, (1967) 64 D.L.R. (2d) 117 (Ont. C.A.). Given the obvious relationship between the *date* by which evidence of membership must be obtained and filed, and the *time* as of which evidence of membership must be determined, the Board invariably determines that the time for ascertaining membership and objection under clause 103(2)(j) is the terminal date. If the Board determines in a particular case that the terminal date established for that application prior to its hearing date would not be appropriate as the "time" contemplated by clause 103(2)(j) and subsection 7(1) of the Act, then it will extend the terminal date so that the two can be made to coincide.

14. Time is of the essence in labour relations matters. Subsection 7(1) of the Act requires that the Board consider the wishes of the persons who were employed on the application date. It is important that those wishes be determined expeditiously, and that determination cannot be made until after the time as of which it is to be made. Fairness requires that all interested parties be able, when they receive notice of application, to predict with reasonable certainty the time as of which membership and objection will be determined.

These considerations favour the fixing of that date as close to the application date as the need to give notice of it will permit. If affected parties receive adequate notice of the terminal date initially set by the Registrar, there is obvious good reason both to adopt that date under clause 103(2)(j) and to pursue a policy of doing so in like circumstances. In *R v. OLRB Ex parte Hannigan*, *supra*, at page 128, Laskin J. A., as he then was, observed that:

...fixed times to govern the various steps in a certification or other proceeding before the Board and to set limits within which the necessary materials of proof must be submitted must be established as a guarantee of regularity, of fairness to employees, trade unions and employers; and to avoid chaos in administration. What is true of the Courts is true of this and other Boards. The Labour Relations Board, particularly, must have a general rule to govern the date as of which a count can be made of those employees who comprise the bargaining unit for which certification rights are sought; and a period with a fixed outside date for establishing proof of membership or non-membership of such employees in the trade union seeking certification. Since fluctuations in employment occur in even the most stable enterprises, it is not surprising that it be thought desirable to contain the proof or disproof of union membership within a fixed time period, especially when it is necessary for the Board to satisfy itself of the genuineness of the tendered proof or disproof which is required to be in written form. To allow either or both the time as of which the bargaining unit count of employees is fixed, and as of which union membership of employees within the unit is fixed, to be a mere matter of case to case discretion would shake confidence in the regularity of certification proceedings.

The Board put it this way in *Hostess Food Products Ltd.*, [1980] OLRB Rep. May 710:

4. The requirements of Rule 48 are mandatory. Unless the evidence of membership in, or objection to, the union is filed in a timely fashion, the Rule provides that it "shall not be accepted." The Board has the power to vary the terminal date pursuant to section 57(2) of the Rules, however this is not a power which should be exercised lightly. It is essential that there be one clear point in time, at which the Board can ascertain the views of the employees, and make the determinations required by section 7 of *The Labour Relations Act*. This is done by fixing a terminal date pursuant to section 92(2)(j) of the Act, (see, *R. v. O.L.R.B. Ex Parte Hannigan*, (1967), 64 D.L.R. (2d) 117 (OCA)) and clearly advising all of the parties that material must be filed by that date.

5. If applications for certification are to be dealt with expeditiously and equitably, it is important that the terminal date provide a firm benchmark for all of the parties affected by the application; although this does not mean that the terminal date is entirely inflexible. In exercising its discretion to extend the terminal date the Board has adopted an approach which is sensitive to the particular circumstances of the case. In *Kilean Lodge Incorporated* [1977] OLRB Rep. April 240 the Board commented:

The Board's approach in such cases has been to avoid fixing any rigid formula to determine whether the employees in any given application have been given adequate notice. Where a request for an extension of the terminal date is made the Board prefers to assess the merits of each request in the light of the particular fact surrounding it. Among the things the Board takes into account are:

1. The number of days the notice was posted.
2. The manner in which it was posted, including the frequency of locations of posting on the respondent's premises and whether it was sent to employees individually by mail.
3. The number of employees in the bargaining unit and the frequency of their presence on the premises during the time of posting, having particular regard to shifts and days off.
4. Whether any delay in posting is attributable to the employer.

5. Whether the request for an extension is made by the employer alone or by a group of employees. This may be especially relevant where employees have made no request for an extension of time and posting was delayed by the employer's own conduct.

(see, generally, *Lanark Mills Ltd.*, [1965] OLRB Rep. Aug. 356 *Joesug Realty Ltd.* [1966] OLRB Rep. July 278; *The Breithaupt Leather Company Limited* [1966] OLRB Rep. Dec. 734; *Dominion Sport-Service Limited* [1967] OLRB Rep. June 266; *J.H. McNairn Limited* [1973] OLRB Rep. Feb. 90).

15. Their counsel asserted that the objectors were all employed in the bargaining unit on the application date. There is no suggestion that they received less than adequate notice either of the terminal date or of the first hearing date in this application. They do not want the terminal date extended so as to afford them adequate notice of it; they want the terminal date changed because their wishes have changed since the terminal date. Employee wishes may well change with time and circumstances. The Legislature recognized that when in subsection 7(1) it required the Board to establish a fixed point in time as of which it would ascertain membership. The fact that employee wishes change is precisely the reason for having such a provision. That provision would be meaningless if a change in wishes was reason enough to revise the time as of which membership would otherwise be ascertained. Such an approach would destabilize both the Board's proceedings and the employment relations of the parties to them. It would be illogical, institutionally counterproductive and ultimately unfair to the vast majority of parties who come before it for the Board to treat post-terminal date changes in wishes as sufficient grounds for a change in terminal date: *Toronto Board of Education*, [1970] OLRB Rep. July 430.

16. For similar reasons, the mere fact that the hearing of this application took some months is not a persuasive ground for extension of the date as of which membership is to be ascertained. It is not correct to say that the delay was the sole result of inter-union rivalry. Final disposition was delayed in this case because a number of issues had to be dealt with. Some of those were issues raised solely by the intervener trade unions. Some were issues raised and relied upon by the respondent employer as well as the interveners. Some were issues raised by the applicant. In any event, the identity of the party or parties whose allegations most consumed the Board's hearing time seems an inappropriate focus of attention in assessing the effect delay should have on the exercise of discretion under section 7(2). In *Baltimore Aircoil Interamerican Corp.* [1982] OLRB Rep. Oct. 1387, the Board held that a delay in final disposition which resulted from successful judicial review of its first disposition did not justify the Board's exercising its discretion under subsection 7(2) to direct a representation vote:

37. ... We cannot agree that a representation vote should be directed on the sole basis of the passage of time since the date of filing of this application for certification. Prior to the interim certification provisions enacted in 1975, the Board experienced many complex applications, that without the intervention of judicial review, took a very long period of time to process differences between the parties. These differences usually centered on the configuration and composition of the bargaining unit. Even today, complex applications for certification involving widespread unfair labour practices or bargaining unit problems can take more than a year to process. If the Board were to accept that the mere passage of time could so fundamentally affect the outcome of an application for certification, an unfairness would be visited on those applicants who, by no fault of their own, become involved in complex and lengthy certification matters. There may also be encouragement for some parties to seek to delay a case in order to achieve this outcome. Clearly, there are equities on both sides of this issue. The turnover in the employer's workforce since the date of application is considerable. However, as already noted, the same level of turnover is possible in a lengthy application for certification not

involving judicial review. In fact, the statute, by creating the concepts of ‘application date’ and ‘terminal date’, has considered the effects of labour force turnover and recognized that at some point in time the composition of a bargaining unit must be considered frozen to provide a stable basis for the purposes of a certification application. See *Fuller’s Restaurant*, [1980] OLRB Rep. Sept. 1289. Considering the submissions of the parties and the evidence before us, we are of the view that the parties are best put in the position they would have been in had the Board not erred by considering this application as if there had been no passage of time.

The reasoning in this passage bears equal application to delay as a ground for extending the terminal date so as to make it possible to consider a petition in connection with the exercise of the discretion to direct a representation vote; the length of the delay should not alone influence the exercise of that discretion.

17. Accordingly, the Board determines under clause 103(2)(j) of the Act that May 17, 1984, the terminal date, shall be the time for ascertaining membership for the purpose of subsection 7(1) in this application. As of that date, more than fifty-five per cent of persons employed in the bargaining unit on the application date were members of the applicant.

18. When this application was filed, CURRE had the right under the *Labour Relations Act* to act as exclusive bargaining agent of the employees in the subject bargaining unit. Certification of the applicant would terminate that right (see subsection 56(1) of the Act). The Board’s practice where an incumbent trade union holds the bargaining rights sought by an applicant is described in *NCR Canada Ltd.*, [1974] OLRB Rep. Dec. 847:

8. Had the [incumbent trade union] intervened in these proceedings the Board would have followed its usual practice and directed a vote in the name of the applicant as well as the aforementioned trade union. Notwithstanding the membership evidence of an applicant, the very existence of such an intervener, provided its bargaining rights have not been abandoned, casts a doubt on the true wishes of the employees which is most appropriately resolved by the taking of a representation vote. We see no reason to vary this practice despite the failure of the incumbent trade union to intervene and attend at the hearing, and in support of this ruling we rely upon *Employees’ Association of the Toronto Plants of Canadian John Wood Manufacturing Company, Limited and Service Station Equipment Company, Limited, and Canadian John Wood Manufacturing Co., Ltd.* 46 CLLC 16, 449, where Professor Finkelman wrote:

“... There has been no intervention in the present proceedings. Had the United Steelworkers of America, Local 3062, intervened in these proceedings, we should have followed our usual practice in such cases, practice sanctioned by the decision of the National Board in the *New York Central* case, [Dominion 10,436], and directed a vote in which the name of the petitioner, as well as that of the aforementioned trade union would both have appeared on the ballot, so as to enable the employees to indicate their preference. In our opinion, the employees should be afforded such a choice in this instance despite the fact that the United Steelworkers of America, Local 3062, has not intervened in these proceedings. Such a course would carry out the thought which motivated the National Board in the *New York Central* case, *supra*, namely, that an organization which holds a collective agreement should not be displaced unless the employees are given an opportunity to mark their ballots in its favour.

Our conclusion in this respect is also in line with our decisions in the *Beach Foundry* case, [16,443], the *Purity Bread* case, [16,447] and the *Toronto Transportation Commission* case, [16,448]. The underlying principle in all of these cases is that stability in collective bargaining relations should be promoted to the fullest extent that the law will permit. This case must be distinguished from those cases in which an agreement has run

its full course and the trade union or employees' organization party to such agreement, having lost interest in the employees, makes no effort to renew the agreement. It must also be distinguished from those cases in which a trade union or employees' organization party to an agreement has been dissolved or has disintegrated and has thus ceased to exist, *Breithaupt Leather* case, [16,446]. In those instances, we would not be inclined to include the name of such an organization on the ballot unless it actually intervened in the proceedings. Here, the trade union which was a party to the agreement was still a living force and still retained its interest in the collective agreement when the application of the present petition was filed."

CURRE participated in these proceedings, and actively opposed this application until April, 1985, when it agreed to withdraw its intervention and advised the Board it wished to abandon its bargaining rights. In *Famz Foods Limited*, [1984] OLRB Rep. Dec. 1714, the Board held that a representation vote offering a choice between an applicant and incumbent is not necessary when the incumbent advises the Board that it wishes to abandon its bargaining rights; if an applicant in those circumstances demonstrates sufficient membership support, the Board may certify it without a vote. The applicant asked that the same approach be applied in this case.

19. The facts in the earlier *Famz Foods Limited* case are different from those here. That decision concerned an application by Local 88 for certification for a unit of employees at this respondent's Swiss Chalet restaurant in Windsor, Ontario. The UFCW had been denied standing as an intervener, and the application was not opposed. CURRE and Local 88 were not and never had been antagonists; indeed, Local 88's "raid" was supported by CURRE at that and other Swiss Chalet locations. In short, it was a "friendly raid" from the start. The earlier *Famz Foods Limited* decision relied on the Board's decisions in *The Marra's Bread Limited*, [1965] OLRB Rep. June 156 and *The Craig Bit Company Limited*, [1978] OLRB Rep. May 411, which both involved displacement applications in which express abandonment of bargaining rights by an incumbent resulted in the Board not conducting a representation vote. In *Craig* the "raid" was "friendly" from the start; the brief report in *Marra's* does not describe the events which led to the application. Here the application was opposed at the outset and for a considerable time thereafter. Having regard to that difference, and to the Board's statement in *NCR Canada Ltd.*, *supra*, that "the very existence of such an [incumbent trade union] intervener, provided its bargaining rights have not been abandoned, casts a doubt on the true wishes of the employees which is most appropriately resolved by the taking of a representation vote", the Board invited and received submissions on the proper exercise of discretion under section 7(2) in the event it determined, as it now has, not to extend the terminal date.

20. Having considered the parties' submissions, we are satisfied that a representation vote should not be ordered. The mere passage of time and attendant alleged changes of wishes since the terminal date would not warrant our so doing, as we noted in paragraph 16 above. The objectors do *not* say that they were opposed as of the terminal date but failed to file evidence thereof at that time because they thought the pre-existence of CURRE and its bargaining rights would inevitably result in a two-way representation vote, and such a reliance interest argument would be hard to accept. The Form 6 notice says nothing about a representation vote or the circumstances in which it might be directed; the form does state quite clearly that expressions of opposition must be filed by the terminal date. An employee who knew nothing about this Board's practice and jurisprudence could have no basis for a claim of reliance on the presence of an incumbent trade union in choosing not to oppose; if such knowledge were assumed, it is hard to see how one could avoid also assuming awareness of the exceptions to the Board's ordinary practice in displacement applications.

21. We were troubled by the statement in *NCR Canada Ltd.* quoted in paragraph 18 above. Our task is to consider employee wishes as of the terminal date. CURRE had not abandoned its rights at that time. On the theory advanced in *NCR*, CURRE's existence "cast doubt" on the true wishes of employees at that time just as a numerically relevant petition would, with the same consequence for the exercise of the Board's discretion. The weak link in this chain of reasoning is the statement in *NCR* itself. The theory that an incumbent's mere existence "casts doubt" on employee wishes is simply wrong. There is a critical difference between a relevant petition and pre-existing bargaining rights when assessing their effect on an application for membership or other membership evidence which is otherwise reliable as a measure of the desire of an employee to be represented by an applicant. Incumbent bargaining rights will necessarily predate any fresh membership evidence on which outright certification might be granted, while signatures on a petition are "relevant" only to the extent they postdate membership evidence filed on behalf of the signatory. The last signification of wishes before the terminal date is ordinarily the most relevant to the question of wishes as of that date: see *Baltimore Aircoil Interamerican Corporation, supra*, at paragraph 49. It is not some constructive doubt about membership evidence that warrants directing a vote in displacement situations, it is faithfulness to the theme expressed in *Canadian John Wood Manufacturing Co. Ltd.*, 46 CLLC 16,449 and reflected in the termination provisions of the *Labour Relations Act*: no matter how many employees have signed in support of termination of an incumbent's bargaining rights, those rights should not be terminated without a vote. That policy reflects respect for acquired trade union rights, not concern about employee confusion. That policy does not apply, and the pre-existence of bargaining rights does not alone warrant directing a vote, if the incumbent advises the Board that it does not wish, for whatever reason, to continue representing the unit.

22. In all of the circumstances, we are satisfied that we do not need the confirmatory evidence of a representation vote, and have determined not to direct that one be conducted. Accordingly, a certificate will issue to the applicant with respect to the bargaining unit referred to in paragraph 1 above.

2410-83-U United Food and Commercial Workers International Union, Complainant, v. **Foodcorp Limited**, Respondent #1, v. Swiss Chalet Employers' Association on behalf of its member Viriato Foods Inc., Respondent #2, v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union AFL-CIO-CLC, Local 88, Intervener

Discharge for Union Activity - Unfair Labour Practice - Whether grievor discharged because of support for union attempting displacement - Board left in doubt whether innocent explanation or unlawful motive behind discharge - Employer's lack of credibility and attempt to mislead Board causing Board to find against employer

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *F. W. Murray* and *B. Lee*.

APPEARANCES: *S. B. D. Wahl, L. Steinberg and V. Gentile* for the complainant; no one for respondent #1; *Bruce Pollock, F. Charron and V. Couto* for respondent #2; *Michael G. Horan and James Whyte* for the intervener.

DECISION OF THE BOARD; June 28, 1985

1. The style of cause is amended to show "Swiss Chalet Employers' Association on behalf of its member Viriato Foods Inc." as a second respondent.

2. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the grievor, Vitalina Teixeira, was terminated contrary to the provisions of sections 64, 66 and 70 of the Act. The most relevant provision appears to be section 66(a) which provides as follows:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

4. The grievor was terminated in December 1983 while working as a waitress at a Swiss Chalet restaurant in the City of Mississauga. It is common ground that at one time the restaurant was owned by Foodcorp Limited. The complaint as filed named Foodcorp Limited as the only respondent. However, it is the contention of the Swiss Chalet Employers' Association, acting on behalf of Viriato Foods Inc., that at the relevant time Viriato Foods Inc. was the grievor's employer. In this regard, it is contended that Viriato Foods Inc. now owns the restaurant and operates it pursuant to a franchise arrangement between the company and Foodcorp Limited. All parties participating in these proceedings agreed that the complaint should proceed against both Foodcorp Limited and Viriato Foods Inc., with the Board at the end of the proceedings making a determination as to which of the two had been the grievor's

employer. The only evidence relating to this issue was given by Mr. Viriato Couto, the president and sole shareholder of Viriato Foods Inc. This evidence, while fairly limited, suggests that Viriato Foods Inc. and not Foodcorp was the grievor's employer. Accordingly, for the purposes of this decision, Viriato Foods Inc. will be treated as having been the grievor's employer.

5. On October 19, 1981, the Swiss Chalet Employers' Association and the Canadian Union of Restaurant and Related Employees entered into a purported collective agreement. At the commencement of these proceedings, counsel for the intervener contended that the bargaining rights of Canadian Union of Restaurant and Related Employees had been acquired by Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88. In certain other proceedings the complainant, United Food and Commercial Workers International Union, had already taken the position that the Canadian Union of Restaurant and Related Employees was not a trade union, that Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88 had not acquired the bargaining rights of Canadian Union of Restaurant and Related Employees, and that the purported collective agreement was not, in fact, a true collective agreement. Without prejudice to any of these contentions, the parties agreed that the instant complaint should go forward on the *assumption* that Local 88 is a trade union that has acquired the bargaining rights of Canadian Union of Restaurant and Related Employees, and that at the relevant time it was bound to the collective agreement with the Swiss Chalet Employers' Association. The parties also indicated that they were prepared to assume that the collective agreement was a valid collective agreement binding on Viriato Foods Inc.

6. For ease of reference, we will henceforth refer to the complainant, United Food and Commercial Workers International Union, as the "UFCW", Viriato Foods Inc. as "Viriato Foods" and both Canadian Union of Restaurant and Related Employees and Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 as "CURRE".

7. On the basis of our finding as to who was the grievor's employer, as well as the assumptions agreed to by the parties, we approach this matter on the understanding that the grievor was an employee of Viriato Foods who came within a bargaining unit of employees represented by CURRE and, as such, was covered by the collective agreement entered into between CURRE and the Swiss Chalet Employers' Association. It is alleged by the UFCW that the grievor was discharged by Viriato Foods because she was a supporter of the UFCW. The UFCW is a rival trade union to CURRE and at all relevant times was actively seeking to win the support of employees at various Swiss Chalet Restaurants, including the restaurant in Mississauga owned by Viriato Foods. Over the objections of the UFCW, the Board granted CURRE status to intervene in the proceedings. The Board did so because, as the bargaining agent of employees of Viriato Foods, CURRE might potentially be affected by any remedial order on the part of the Board.

8. At the commencement of the hearing, counsel for the UFCW indicated that the complaint was based on the contention that the grievor had been discharged due to her support for the UFCW. Near the end of the hearing counsel for the UFCW, for the first time, put forward an alternative basis for the complaint, namely, that the grievor had been discharged for filing a grievance under the CURRE collective agreement. Counsel for Viriato Foods objected to such an allegation being raised so late in the proceedings. A majority of the Board

panel (Mr. Lee dissenting) upheld this objection. While the majority would have permitted the UFCW to raise its alternate ground at a time when counsel for Viriato Foods could have dealt with the allegation when calling evidence and cross-examining the grievor, to allow such an alternative argument to be raised almost at the end of the hearing would, in the view of the majority, have amounted to a denial of natural justice to Viriato Foods. We would note, however, that the possibility that the grievor might have been discharged, in part, because she filed a grievance cannot be a possible defence to the instant complaint, in that such conduct would itself be a violation of the Act. See: *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254.

9. In 1979 the grievor was hired as a waitress at a Swiss Chalet restaurant in Brampton. She quit this job in April 1982. In June of 1982 she started at a Swiss Chalet restaurant in Rexdale owned by Foodcorp Limited. The manager of the restaurant was Viriato Couto who later was to become the owner of Viriato Foods. When testifying before the Board, Mr. Couto agreed that at the Rexdale restaurant the grievor had been a good employee, and had performed the cleaning work that waitresses were expected to perform. Mr. Couto also agreed that at Rexdale the grievor had been promoted to the position of assistant hostess, but at her own request had been returned to the position of waitress. After the grievor had been at the Rexdale restaurant for about one year, Mr. Couto was transferred to another Swiss Chalet store. In September of 1983 Mr. Couto became, through his company Viriato Foods, the franchisee of the Swiss Chalet restaurant in Mississauga, as well as its manager.

10. In November of 1983 the grievor, who was still employed at the Swiss Chalet restaurant in Rexdale, decided that she would like to move to the restaurant in Mississauga because it was closer to her home. There is a sharp discrepancy in the evidence relating to when it was that the grievor first contacted Mr. Couto. According to the grievor, she telephoned Mr. Couto and asked if there were any openings at the Mississauga store, to which he responded she should come in and see him. The grievor testified that during this telephone conversation Mr. Couto advised her that if she were to change restaurants, she would not lose her seniority and that the only difference would be that she would have a different punch card number. Mr. Couto denied that he had talked to the grievor on the telephone. According to Mr. Couto, he had been telephoned by the hostess at the Rexdale restaurant who advised him that she had an employee who wanted to work closer to her home, and that she would send the employee over to see him.

11. Article 13.01 of the collective agreement between the Swiss Chalet Employers' Association and CURRE stipulates that seniority under the agreement is referable to length of service with an Association member, and is to be "on an in-store basis". Article 26.02 indicates that when an employee is transferred unilaterally by the Swiss Chalet Employers' Association, she takes her seniority with her. These two articles, when read together, lead us to conclude that an employee who changes restaurants at her own request does not, under the terms of the agreement, bring her previous seniority with her. This loss of seniority is important in that article 13.02 of the agreement provides that a new employee will be on probation during her first three months and has no seniority rights during that period. Further, article 4.01 stipulates that only employees who have acquired seniority can grieve a discharge.

12. It was the evidence of both the grievor and Mr. Couto that on November 19, 1983, the grievor went to the restaurant in Mississauga and met with Mr. Couto. According to Mr. Couto, at this meeting he advised the grievor that she would be on probation for 3 months. The grievor testified that Mr. Couto did not say that she would be on probation, although she

recalled that he stated that she was "to start like new". The grievor added that she now realized that she should have asked Mr. Couto what he had meant by this remark, but at the time she "let it go".

13. Evidence was led relating to a contract of employment signed by the grievor. There was some confusion in the evidence because both Mrs. Maria De Sousa, the hostess at the Mississauga restaurant, and Mrs. Boonsri Wan, an assistant hostess, testified that she had filled in the contract. On all of the evidence, however, we are satisfied that what actually happened was that on separate occasions Mrs. De Sousa and Mrs. Wan met with the grievor to obtain the relevant information from her, although it was Mrs. Wan who actually filled in the document. Subsequently, Mrs. Wan gave the document to Mrs. De Sousa who, approximately one week after the grievor had commenced work, approached the grievor to obtain her signature on it.

14. The grievor commenced working at the Mississauga restaurant on Wednesday, November 23, 1983. Mr. Couto testified that two days later on Friday, November 25th, it was reported to him that the grievor had tried to stop the other employees from cleaning their work stations and doing other "side work", such as filling salt and pepper shakers. According to Mr. Couto, he did not himself see the grievor trying to stop other employees from doing their work, but this is what had been told to him by Mrs. De Sousa and Mrs. Wan. Mr. Couto testified that he did not discuss these reports with the grievor since she had been working at the restaurant for only two or three days, and he wanted to "see more". Mr. Couto stated that he was subsequently advised by Mrs. De Sousa and Mrs. Wan that groups of waitresses were getting together and talking in groups with the grievor. Mr. Couto added that Mrs. De Sousa had also told him that the atmosphere in the dining room was "no good", something which he himself had also noticed. Twice in his testimony Mr. Couto testified that both Mrs. De Sousa and Mrs. Wan had advised him about problems relating to the grievor, although subsequently he stated that Mrs. Wan had not, in fact, talked to him directly, but had instead passed on her comments to him through Mrs. De Sousa.

15. Mrs. Wan, the assistant hostess, testified that on Friday, November 25th, two days after the grievor had commenced work, she had a discussion with the grievor while the grievor was engaged in cleaning ashtrays and seats in the banquet room portion of the dining room. According to Mrs. Wan, the grievor stated that this is "super clean here". Mrs. Wan understood this comment to be a complaint relating to the amount of cleaning the grievor was required to perform. According to Mrs. Wan, on Sunday, November 27th she advised Mrs. De Sousa of the grievor's comment. Mrs. Wan added that she never again heard the grievor complain about the cleaning. Mrs. Wan did state that during the following weekend she noticed that the grievor had not properly cleaned certain tables, and that she had advised Mrs. De Sousa of this fact.

16. Mrs. Wan also testified that during the second weekend of the grievor's employment, which would have been on December 3rd or 4th, she overheard some waitresses discussing the fact that the grievor had been complaining about there being too much cleaning work to perform. During her cross-examination, Mrs. Wan was asked if she had ever seen the grievor talking with groups of waitresses. Mrs. Wan indicated that she had not. Mrs. Wan further indicated that she had not seen the grievor causing problems with the other waitresses, and had not seen the grievor trying to stop other waitresses from doing their cleaning. Mrs. Wan also testified that she had not told either Mrs. De Sousa or Mr. Couto that the grievor was causing problems with the other waitresses.

17. Mrs. De Sousa testified that a couple of days after the grievor had started work she overheard some waitresses talking about how the grievor was complaining about the cleaning work, and that a few days after this she was advised by Mrs. Wan that the grievor was unhappy with the amount of cleaning required of her. According to Mrs. De Sousa, on Saturday, November 26th, she had passed this information on to Mr. Couto. Mrs. De Sousa testified that about a week later, which would have been on or about December 3rd, she advised Mr. Couto that the other waitresses were upset about the grievor, and also that, in her opinion, the atmosphere in the dining room was not very good. Mrs. De Sousa testified that the grievor had continued to perform the required cleaning work, and that she had not told Mr. Couto anything to the contrary. Mrs. De Sousa further testified that the other waitresses had continued to perform their cleaning work, and she denied the suggestion that she had advised Mr. Couto that the other waitresses were not doing this work, or that the other waitresses had been standing around talking with the grievor.

18. The grievor testified that she did not recall having talked about cleaning work on her first weekend at the Mississauga restaurant. Asked if she had complained about the cleaning work, the grievor replied that she had not, and that cleaning work was something she had been doing for years. The grievor did say, however, that one day while she was busy cleaning, another waitress by the name of Doris asked her about the difference in cleaning between restaurants, to which the grievor replied that at Rexdale there was not as much cleaning as at Mississauga.

19. All of the evidence indicates that the grievor was a capable waitress. The grievor testified that while at the Rexdale restaurant, she had acquired the nickname of "Speedy Gonzales". Mrs. De Sousa testified that the grievor had been very good with customers, and that she had advised Mr. Couto of this fact. When being cross-examined, Mr. Couto agreed with the suggestion that there had been no complaints from customers about the grievor's work performance. Mr. Couto commented that the grievor had been a good and fast waitress at Rexdale and remained a good and fast waitress at Mississauga, although at Mississauga she had been stopping other waitresses from cleaning their stations.

20. It will be recalled that on November 19, 1983, prior to the grievor commencing work, she was advised by Mr. Couto that she would start "like new". When Mrs. De Sousa had the grievor sign the employment contract, which was about one week after she had started working at the Mississauga restaurant, Mrs. De Sousa made it clear to the grievor that she was not being credited with her seniority at Rexdale. Near the end of November or on the first day of December, 1983, the grievor telephoned Mr. James Whyte, a business representative with CURRE, with respect to the loss of her seniority. On December 2, 1983, Mr. Whyte filed a written grievance on behalf of the grievor relating to her seniority standing. In testifying before the Board, Mr. Couto indicated he was uncertain as to when it was he had received the grievance. At one point he indicated that he had placed the notation "Received December 13, 1983" on the grievance form, although, subsequently, he commented that the date may have been put on the grievance by someone at the Swiss Chalet Employers' Association. Mrs. De Sousa recalled that Mr. Couto had mentioned the grievance to her, but was unsure if this was during their conversation about the grievor on November 26th or during their meeting about a week later, which would have been on or about December 3rd. It is clear that the discussion must have been at this second meeting, since on November 26th the grievance had not yet been filed. Mr. Couto testified that upon receipt of the grievance he

advised the grievor that he was not happy about it. According to Mr. Couto, in the same conversation he also asked the grievor why she was trying to keep "the girls" from cleaning their stations, to which the grievor made no reply. In his cross-examination Mr. Couto was asked if, during this discussion, he advised the grievor that she would be fired. Mr. Couto replied that he had not, since he expected that the grievor would improve.

21. The loss of her seniority upset both the grievor and her husband, and, according to the grievor, it resulted in the two of them getting into an argument about the loss of her seniority as well as the amount of money she was making. On a day that Mr. Couto placed as being a Saturday, a few days after he had talked to the grievor about her grievance, which would most likely have been Saturday, December 10th, Mrs. De Sousa came upon the grievor crying in the dining room. The grievor explained to Mrs. De Sousa that she was upset about the loss of her seniority. It was Mrs. De Sousa's testimony that she asked the grievor why she was upset when she had been told before she started she would not keep her seniority. Mrs. Wan testified that she had overheard Mrs. De Sousa's comment to the grievor, although her recollection was that Mrs. De Sousa had stated that the grievor had been told she would start like a new girl. After a brief discussion with the grievor, Mrs. De Sousa took her to see Mr. Couto. Mrs. De Sousa testified that at this meeting Mr. Couto said to the grievor that she had known before she started that she would not keep her seniority, and the grievor acknowledged that this had been the case. For her part, the grievor in cross-examination indicated she could not specifically recall if Mrs. De Sousa had asked her why she was upset when she had known she would not keep her seniority, although she agreed that Mr. Couto might have asked her such a question.

22. According to Mr. Couto, after the grievor had left his office on the day of the crying incident, he asked Mrs. De Sousa if the atmosphere in the restaurant was bad, and Mrs. De Sousa replied that the same problems continued, namely, that the grievor was speaking with groups of waitresses and there was a bad atmosphere. According to Mrs. De Sousa, however, on the day in question she had not discussed these matters with Mr. Couto. Further, as already noted, it was Mrs. De Sousa's evidence that she had not seen the grievor talking with groups of waitresses, and had not told Mr. Couto that she had.

23. The grievor was terminated on Friday, December 16, 1983. Mr. Couto testified that he alone made the decision to terminate her. According to Mr. Couto, his decision was based on the reports he had received about the complaining the grievor had been doing, her speaking with groups of waitresses, and her action in stopping other waitresses from cleaning their stations. Mr. Couto testified that on either Wednesday, December 14th, or Thursday, December 15th, he advised Mrs. De Sousa that if the grievor did not improve, he would have to discharge her. Later in his testimony, Mr. Couto stated that he decided to discharge the grievor as soon as Mrs. De Sousa advised him that the situation had not improved. When questioned about this, however, Mrs. De Sousa indicated that no such discussion had occurred. Mrs. De Sousa testified that during the morning of Friday, December 16th, Mr. Couto advised her that he was going to let the grievor go because he was not happy with her attitude and because of the atmosphere in the dining room. According to Mrs. De Sousa, Mr. Couto did not ask for her opinion about the grievor's attitude or the atmosphere in the dining room. Mrs. De Sousa stated that she recalled bringing the grievor in to see Mr. Couto and that she had been present when he had discharged her.

24. On or about December 22, 1983 a grievance meeting was held concerning the

grievor's seniority grievance. Present at the meeting were the grievor, Mr. Couto, Mr. Whyte from CURRE and Mr. Frank Charron from the Swiss Chalet Employers' Association. In his examination-in-chief, Mr. Couto stated that at the meeting he made the comment that he had told the grievor on her first day of work that she would be "a new girl" on three months probation, but that now she had filed a grievance about the matter and was trying to stop the girls from doing their cleaning. According to Mr. Couto, the grievor acknowledged that this was true. When being cross-examined, Mr. Couto repeated the comment that at the meeting he had told the grievor that she had previously been informed that she would not retain her seniority. He also repeated his statement that at the meeting he told the grievor that she had been preventing the other waitresses from doing their cleaning work, although later in his cross-examination he made the statement that this issue had not, in fact, been talked about.

25. It was the testimony of Mr. Whyte, the representative from CURRE, that while the grievor's seniority standing and her complaining were discussed at the meeting, there was no discussion relating to claims that the grievor had been trying to prevent other employees from doing their cleaning. Mr. Whyte testified that both at the meeting, and in a separate private conversation with himself, the grievor stated that she had done wrong and "opened her mouth" too much. Mr. Whyte added that when he asked the grievor if she wanted to grieve her discharge, she replied that she did not, but would prefer to start afresh in another store. For her part the grievor initially denied that at the meeting she had acknowledged complaining, but when questioned by counsel for CURRE, the grievor agreed that she had told Mr. Whyte she was sorry that she had opened her "big mouth" to complain about the cleaning.

26. Following the meeting on December 22nd, Mr. Charron of the Swiss Chalet Employers' Association formally denied the grievor's seniority grievance. It was not taken to arbitration. It is clear from Mr. White's evidence that, in his view, the grievor was, in fact, a probationary employee without any seniority. It is also clear from Mr. Whyte's evidence that although he had offered to assist the grievor in grieving her discharge, given his view that she was a probationary employee and the collective agreement provision denying probationary employees the right to grieve a dismissal, it was his opinion that such a grievance would not succeed. It is of some interest that, when testifying before the Board, the grievor stated that it had been her impression at the December 22, 1983 meeting that Mr. Whyte was trying to help her, although without success. The grievor subsequently applied for employment with other Swiss Chalet restaurants, but was not hired. She then contacted the UFCW, which filed this complaint alleging that she had been terminated due to her activities on behalf of the UFCW.

27. The grievor testified that she had become a supporter of the UFCW while still an employee at the Rexdale restaurant. After she decided to move to the Mississauga restaurant, the grievor had a discussion with an official of the UFCW, in which she agreed to try to get employees at Mississauga to join the UFCW. The grievor testified that she spoke to Mississauga employees about joining the UFCW, and she showed a number of them UFCW membership cards which she kept in her locker. According to the grievor, on one occasion she showed the UFCW cards to "Debbie", the CURRE steward at the Mississauga restaurant, and Debbie advised her not to show the cards to anyone during working hours or else she might get fired. The grievor testified that it was on the basis of this advice that she only showed the cards to employees when no one in management was around.

28. It was the testimony of Mrs. De Sousa and Mrs. Wan that, prior to the grievor's

termination, they had no knowledge of the UFCW organizing campaign. Mr. Couto stated that he also had not known about the UFCW organizing campaign, or that the grievor was assisting the UFCW. Mr. Couto also stated that, prior to the grievance meeting on December 22nd, he had not talked to a representative of CURRE. According to Mr. Couto, the CURRE representative had at times come by the restaurant, but only to talk to the CURRE steward. Mr. Whyte for his part testified that he first heard about the UFCW organizing drive among Swiss Chalet restaurant employees in August of 1983, and that from that time onwards he made inquiries about the UFCW. Mr. Whyte stated that in his meetings with employees at the Mississauga restaurant it was more than likely that he asked them about the UFCW. Mr. Whyte further indicated that he made a point of asking Swiss Chalet restaurant managers if they had seen any evidence of the UFCW. Mr. Whyte testified that while he had no specific recollection of speaking to Mr. Couto about the UFCW, he believed he could have done so, and on more than one occasion.

29. Before assessing the merits of this case, we would make several comments relating to the role of CURRE and CURRE officials in these proceedings. CURRE sought, and over the objections of the UFCW was granted, status to participate in these proceedings. At the commencement of the proceedings, counsel for CURRE took a "low key" essentially neutral role. As the hearing progressed, however, there was evident a growing hostility between the CURRE and UFCW representatives, as well as an ever more active involvement in the proceedings by counsel for CURRE. This state of affairs appears to have been caused primarily by suggestions by counsel for the UFCW that CURRE representatives had some involvement in the grievor's termination. In particular, it was suggested that Debbie, the CURRE steward, had advised Mr. Couto that the grievor had been organizing for the UFCW. A leaflet distributed to Swiss Chalet employees by the UFCW with respect to the proceedings before the Board did not help matters. This leaflet, which was put out over the grievor's name, although she testified that she had not written the material or even seen it prior to the leaflet's distribution, made disparaging remarks about CURRE, while at the same time praising the UFCW for taking up the grievor's case at the Board.

30. The evidence indicates that officials of CURRE did not play any role in the grievor's termination. To the contrary, they sought to be of assistance to the grievor. It will be recalled that when the grievor showed UFCW membership cards to Debbie, the CURRE steward, Debbie advised her not to show the cards to anyone during working hours so as to avoid the possibility of being discharged. Following the grievor's termination, Mr. Whyte from CURRE met with management in an attempt to assist the grievor. The grievor herself testified that it was her impression that Mr. Whyte had tried to help her. We have no doubt but that when Mr. Whyte testified before the Board, he sought to give an honest account of the events he was involved with. Some of Mr. Whyte's testimony was not favourable to the grievor, particularly his statement that on December 22nd the grievor stated that she had opened her big mouth too much. However, the grievor herself, after first denying that she had done so, admitted that she had made such a comment to Mr. Whyte. Further, certain aspects of Mr. Whyte's testimony, including his statement that at the meeting on December 22nd there was no discussion about the grievor trying to prevent employees from doing their cleaning, and his statement that he believed he had spoken to Mr. Couto about the UFCW, did not assist the employer's case.

31. As already noted, the complaint before us alleges that the grievor was discharged contrary to the *Labour Relations Act* because of her support for the UFCW. The complaint

was filed with the Board under section 89 of the Act. Section 89(5) deals with the burden of proof in complaints such as this in the following terms:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

32. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, which was one of the early cases decided by the Board after the enactment of what is now section 89(5), the Board commented on the effect of the provision as follows:

... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

Another relatively early case relating to the reversal of the onus of proof was *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299 wherein the Board stated:

Section 79(4a) [now section 89(5)] of *The Labour Relations Act* places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment; the employer's actions must be devoid of "anti-union animus." (See the *Bushnell* case (1974) 4 O.R. (2d) 332.) The employer cannot engage in anti-union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 and *The Corporation of the City of London*, [1976] OLRB Rep. Jan. 99.)

33. With these general principles in mind, we turn now to consider the facts of the present case. One issue raised by the evidence is whether or not Mr. Couto viewed the grievor as a probationary employee. It is generally understood that during an employee's probationary period, the employer has an opportunity to assess the suitability, of a new employee, not only with respect to her ability to do the work assigned, but also her general suitability, which includes her ability to work in harmony with others. See: *Re United Rubber Workers, Local 561 and Rosedale Plastics International*, 11 L.A.C. 71 (Anderson). The collective agreement between CURRE and the Swiss Chalet Employers' Association recognizes this by purporting to restrict the right of probationary employees to grieve a discharge. Because the issue in these proceedings is what motivated Mr. Couto's decision to discharge the grievor, our concern is not with the issue of whether the grievor actually retained her previous seniority, but rather, whether Mr. Couto believed this to be the case. We are satisfied that Mr. Couto did, in fact, view the grievor as a probationary employee without any seniority. Even if Mr. Couto did, as the grievor claims, advise her on the telephone before they met that if she changed restaurants she would keep her seniority, it is apparent that he subsequently had a change of mind. The grievor acknowledges that when Mr. Couto formally offered her a job he indicated she was "to start like new". In addition, from Mrs. De Sousa's testimony, we are satisfied that Mr. Couto referred to the grievor as a probationary employee.

34. Given the grievor's admitted comment to Mr. Whyte that she had "opened her mouth" too much, as well as the testimony of Mrs. De Sousa and Mrs. Wan, we are led to conclude that the grievor did, in fact, make certain comments about the amount of cleaning required in the restaurant and that her comments became the subject matter of discussion among some of the other waitresses. We are further satisfied that Mrs. De Sousa passed this information on to Mr. Couto within a few days of the grievor's starting work, and again during the weekend of December 3rd and 4th. Mrs. De Sousa also told Mr. Couto that, in her view, the atmosphere in the dining room was not very good. Given that Mr. Couto viewed the grievor as a probationary employee, he might well have viewed these matters as a basis for terminating her. Notwithstanding this, certain aspects of Mr. Couto's evidence as to why he discharged the grievor cause us some concern.

35. One area of concern relates to Mr. Couto's claim that he discharged the grievor because he had been advised by Mrs. De Sousa and Mrs. Wan (either directly or through Mrs. De Sousa) that the grievor was stopping other waitresses from doing their cleaning, and talking to groups of waitresses. The evidence indicates that while there was one instance where the grievor did an unsatisfactory job of cleaning tables, at no time did the grievor refuse to clean, stop others from cleaning, or talk with groups of waitresses. Further, both Mrs. De Sousa and Mrs. Wan denied having told Mr. Couto that the grievor had engaged in any such conduct. The second aspect of Mr. Couto's evidence that causes us concern is his statement that he discussed the grievor with Mrs. De Sousa one or two days before he discharged her, and that Mrs. De Sousa advised him that the problems were continuing, namely, the complaining about the cleaning and stopping other waitresses from doing their work. Mrs. De Sousa, however, denied that any such conversation took place.

36. We have no reason to doubt the evidence given by Mrs. De Sousa and Mrs. Wan. While Mrs. De Sousa had some difficulty remembering dates and the sequence of events relating to the contract of employment signed by the grievor, in our view this does not detract from the general reliability of her evidence. Mrs. De Sousa and Mrs. Wan did not contradict themselves or each other with respect to major occurrences. Further, their evidence was generally consistent with much of that given by the grievor. (As for the grievor, it is clear that on a number of occasions she sought to tailor the evidence to assist her case, although when pressured on cross-examination she reversed herself.) While we view Mrs. De Sousa and Mrs. Wan as credible witnesses, the same cannot be said with respect to Mr. Couto. Several times he contradicted himself. His testimony that he had received complaints about the grievor stopping other waitresses from doing their work and standing around talking with groups of waitresses, as well as his claim that he had received a complaint about the grievor just prior to her discharge, were contradicted by Mrs. Wan and Mrs. De Sousa. In these circumstances we are prepared to accept the evidence of Mrs. De Sousa and Mrs. Wan where it conflicts with that of Mr. Couto. Further, in our view, the differing evidence given by Mr. Couto was not the type of detail likely to be the result of a faulty memory. This, in turn, leads us to conclude that Mr. Couto deliberately sought to mislead the Board with respect to certain of his evidence.

37. Mr. Couto sought to mislead the Board into believing that the grievor's conduct had been much more serious than it was. He also sought to mislead the Board into believing that just prior to making his decision to terminate the grievor, he had received a report about serious misconduct on her part, when in fact he had not received any negative reports about

the grievor for close to two weeks. These facts throw serious doubts on the evidence of Mr. Couto as to why he decided to discharge the grievor. As noted in the *Barrie Examiner* and *Pop Shoppe* cases, *supra*, given the reversal of the onus of proof in matters such as this, an employer is required to satisfy the Board as to what prompted it to discharge an employee, and that the reasons were not tainted by an anti-union motive. However, Mr. Couto's abrupt change from his apparent willingness to wait and see if the grievor would improve, as well as his attempts to mislead the Board with respect to certain critical matters, throw into real doubt his purported justification for discharging the grievor.

38. It may have been that Mr. Couto decided to terminate the grievor only because of her complaining, and that he embellished his evidence about the seriousness of her conduct because he felt it would make a more convincing story. Likewise, he may have falsely claimed that Mrs. De Sousa complained to him about the grievor shortly prior to her termination because he felt that this would sound more convincing than some other perfectly innocent explanation as to why there had been a delay between receiving his last negative report about the grievor and her discharge. However, it is also possible that, shortly prior to the grievor's termination, Mr. Couto became aware of her activities on behalf of the UFCW, and at least, partly because of this, decided to terminate her. In this regard, Mr. Couto's evidence that he knew nothing about the UFCW organizing campaign is highly suspect, given that he sought to mislead the Board about other matters and Mr. Whyte's evidence that he believed that he had discussed the UFCW with Mr. Couto on more than one occasion. Mr. Couto had the onus to satisfy us that the grievor's discharge was not motivated by the fact that she had been organizing for the UFCW. He has not done so. In these circumstances, we are led to conclude that Mr. Couto, and through him Viriato Foods Inc., has not discharged the section 89(5) burden of proving that it did not act contrary to the Act as alleged in the complaint.

39. Having regard to the foregoing, the Board finds that Viriato Foods Inc. contravened section 66 of the Act by discharging the grievor. To remedy that contravention of the Act, the Board directs that Viriato Foods Inc. reinstate the grievor and compensate her for all lost wages and other benefits subject to the general rules of mitigation.

40. A majority of the panel is of the view that, in accordance with the Board's general practice, it would be appropriate for a notice to be posted advising employees of the results of these proceedings and of their rights under the *Labour Relations Act*. Mr. Murray disagrees. It is Mr. Murray's view that such a posting will not serve any useful purpose. Having regard to the majority view, the Board hereby directs Viriato Foods Inc. to post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the firm, in conspicuous places in its restaurant where it is likely to come to the attention of employees, and keep the notice posted for 60 consecutive working days. Reasonable steps shall be taken by management to ensure that the notice is not altered, defaced or covered by any other material. Reasonable access to the premises will be given to a representative of the UFCW so that it can satisfy itself that this posting requirement is being complied with.

41. The Board will remain seized of this matter in the event that a dispute arises concerning the interpretation, implementation or quantification of the Board's order.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE HAD AN OPPORTUNITY TO PRESENT EVIDENCE. THE BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING VITALINA TEIXERA BECAUSE OF HER ACTIVITY ON BEHALF OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION. THE BOARD ALSO FOUND THAT CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 88, WAS NOT INVOLVED IN ANY WAY WITH MRS. TEIXERA'S DISCHARGE. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES.

TO FORM, JOIN OR HELP UNIONS.

TO ACT TOGETHER FOR COLLECTIVE BARGAINING.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT TERMINATE OR OTHERWISE DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL REINSTATE VITALINA TEIXERA AND PAY HER COMPENSATION FOR ALL LOST WAGES AND OTHER BENEFITS.

FOODCORP LIMITED

AUTHORIZED REPRESENTATIVE

is an official notice of the Board and must not be removed or defaced.

0704-85-U Horton CBI, Limited, Applicant, v. International Association of Bridge, Structural and Ornamental Ironworkers Local 759 and Bob Stoppel, Respondents

Constitutional Law - Picketing - Strike - Respondent union demanding work assignment to its members - Setting up picket line - Prevention of crossing inherent goal of informational picket line at construction site - Refusal because of sentiments of sympathy or solidarity constituting strike - Restrictions in Act on picketing not contrary to freedom of expression in Charter

BEFORE: *R. O. MacDowell*, Vice-Chairman.

APPEARANCES: *Thane Woodside, Jim Hassell, Mike Dautovich and Bill Lush* for the applicant; *David Starkman, Bob Stoppel and Sharryn Aiken* for the respondents.

DECISION OF THE BOARD; June 22, 1985

I

1. This is an application under sections 92 and 135 of the *Labour Relations Act*. The applicant asserts that the respondents have authorized or engaged in certain picketing activity, contrary to sections 74 and 76 of the Act. The provisions of the Act to which reference will be made are as follows:

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

135.-(1) Where, on the complaint of an *interested person*, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or *any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike*, it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

• • •

(3) The Board shall file in the office of the Registrar of the Supreme Court a copy

of the direction made under this section, exclusive of the reasons therefor, in the prescribed form, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.

[emphasis added]

2. Because of the nature of the allegations made by the applicant and the assertion that it might suffer serious economic loss if the case were not heard quickly, the Board abridged the time for filing material, and scheduled a hearing, in Toronto, on Saturday, June 22, 1985. At the conclusion of the hearing the Board advised the parties, briefly, of its factual and legal conclusions, together with the resulting remedial order. The Board indicated that its decision could not be transcribed over the weekend, but that it would be reduced to writing and issued as soon as possible, the following week. The parties were content with that approach. The decision of the Board is set out below.

II

3. The applicant, Horton CBI, Limited, is a company which engages, *inter alia*, in metal plate fabrication and the field erection of storage tanks and pressure vessels. The applicant is presently bound by a collective agreement with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 128 ("the Boilermakers"). It has no collective bargaining relationship or collective agreements with the respondent union. The respondent union does not represent any of the applicant's employees.

4. On or about April 9, 1985, the applicant contracted with the Container Board Division of Domtar Incorporated ("Domtar") to supply labour, supervision, tools and equipment necessary to replace a "barking drum" at Domtar's pulp mill in Redrock, Ontario. The installation is to be done during the mill's vacation shutdown. The applicant is one of a number of subcontractors who are engaged in the repair or installation of equipment at the Domtar site. It is necessary to co-ordinate the applicant's activities with other subcontractors and with the work being done by Domtar's own employees. Time and timing are of the essence. Mike Dautovich, the applicant's assistant construction manager, explained that the company had only a limited "time window" of about 18 hours in which to perform its assigned tasks. This period of intense activity is scheduled to begin on Wednesday, June 26, 1985.

5. The installation of the barking drum will require a crane which has to be brought on site, rigged, and held in readiness to lift the material as required. Without the services of a crane and a crane operator, the applicant would not be able to complete the work contemplated by its contract. The applicant does not have its own crane equipment, and accordingly, has entered into a contract with a subcontractor, Thunder Bay Harbour Improvements ("Thunder Bay") which will provide a crane to enable the applicant to unload and install the replacement barking drum. Thunder Bay is presently bound by the terms of a collective agreement with Local 793 of the International Union of Operating Engineers ("the Operating Engineers").

6. Work at the Domtar site began on Monday, June 17, 1985. It was and remains the

applicant's intention to have the work performed by its own employees, who, as noted, are members of the Boilermakers' union. Therein lies the seeds of the present problem. Robert Stoppel, an official of Local 759 of the International Association of Bridge, Structural and Ornamental Ironworkers ("the Ironworkers") claims that some of this work should be done by members of his Local union. To back up his jurisdictional claim, Stoppel established what was described as an "informational" picket line.

7. The jurisdictional dispute and the picketing precipitated a flurry of phone calls between the parties and employers affected. Some of the testimony concerning what was said is obviously hearsay; however, in this regard, it is necessary to make several observations. Pursuant to section 103 of the *Labour Relations Act* and 15 of the *Statutory Powers Procedure Act*, the Board may accept and act upon hearsay evidence if, in the Board's opinion, it is reliable, and much of the testimony confirmed a pattern of events, established independently, which would have been a remarkable coincidence if the hearsay comments were not, in fact, true. Further, to the extent that the evidence bears directly or indirectly upon the words or conduct of the respondent Robert Stoppel, the Board notes that Mr. Stoppel was present throughout the hearing and had ample opportunity to refute or qualify what was attributed to him by others. Mr. Stoppel did not give evidence. In the circumstances, the Board considers it appropriate to draw the inference that his testimony, if candidly given, would have been contrary to the respondents' position.

8. Mike Dautovich first learned that there was a jurisdictional dispute at the Domtar site when he received a phone call from Jack Slate, the applicant's contract supervisor. Slate told Dautovich that he [Slate] had received a telephone call from Stoppel claiming that the work assigned to the Boilermakers should have been assigned instead to the Ironworkers. Stoppel told Slate that there would be picketing and trouble if the jurisdictional dispute was not resolved in favour of the Ironworkers. The same day, Peter Storie, the engineering manager for Domtar, and Tom Davis, a project engineer, both relayed a similar concern to Bill Lush, the applicant's field foreman in Redrock. Lush was responsible for supervising field construction on the Domtar job. Davis and Storie told Lush that there was a work claim involving the Ironworkers' union and that picket lines might be established to support that claim.

9. Sure enough, the following day (Wednesday, June 19th), four persons picketed both the main entrance and the construction entrance to the Domtar mill. The persons picketing carried stencilled signs which read "Horton is unfair to Ironworkers Local 759". Dautovich was told about the picketing by Storie. Lush observed the picketing directly.

10. The members of the Boilermakers' union crossed the picket line and went to work as usual. The crane operator refused to do so. The crane operator told Lush that he would respect the picket line. As a result, the crane was idle for about eight hours that day, and the work which it was designated to do was not done as scheduled.

11. This situation provoked a series of telephone calls between Dautovich, Storie, and officials of Thunder Bay. Storie expressed concern that a continuation of the picketing could disrupt the orderly completion of the jobs assigned to the various unionized subcontractors working on the site during the mill shutdown period. Thunder Bay undertook to find a crane operator who would be prepared to cross the picket line. Another operator was found later that day.

12. Any confusion about the nature of the problem or the respondents' intentions was dispelled at about 1:35 (i.e. Wednesday, June 19th) when Stoppel himself called Dautovich. Stoppel told Dautovich that the company had made an incorrect award of work to the Boilermakers' members and that ironworkers should have been given the work. He asserted that the work was within his Local's jurisdiction, but he would allow the company to retain boilermakers and issue them temporary ironworker permits, provided the company agreed that it had made an incorrect award and that the work would be reassigned to ironworkers. Dautovich was not prepared to do so. Stoppel retorted that he "knew Horton Steel" and believed that "he would get nowhere with them". The picket lines would therefore be reinstated. He said he would make things "hot and heavy" at the mill. He said there were unemployed millwrights who also had some claim to the work in question and would be willing to help man the picket line. When Dautovich suggested that any jurisdictional dispute should be resolved in accordance with established legal and institutional procedures, Stoppel replied that "if he contacted the representatives in Toronto, by the time they got off their asses to do anything, the work would be complete". He preferred his own methods.

13. The following day (Thursday, June 20, 1985) the pickets returned. They wore the same signs. This time, however, the applicant's boilermakers and the crane operator went to work as scheduled.

14. The respondents have filed a jurisdictional dispute pursuant to section 91 of the *Labour Relations Act* claiming the work in question, however, the respondents are not prepared to undertake to refrain from picketing, or escalating the level of picketing, until their claim is resolved in accordance with the procedure established in the *Labour Relations Act*. The applicant, on the other hand, is concerned that its ability to meet the requirement of its commercial contract within the prescribed time frame will turn on such unpredictable and uncontrollable factors as the number of pickets in place on Wednesday, June 26, 1985 and the depth of union solidarity which the various subcontractors' employees choose to exhibit on that day. The applicant is concerned that if employees (and particularly the crane operator) refuse to cross the picket line - in effect, engaging in a sympathy strike - it may suffer serious financial consequences. Obviously, any interruption in the scheduled work flow could affect other subcontractors and Domtar as well.

III

15. On the basis of the evidence before me I have no doubt that the picketing occurred in the manner described above, and that it was instituted by Mr. Stoppel on his own behalf and on behalf of the respondent union in order to put economic pressure on the company to give in to the Ironworkers' claim. It was a resort to economic pressure in circumstances where Mr. Stoppel questioned the efficacy of the procedures established under the *Labour Relations Act* for resolving jurisdictional disputes. Certainly there was an "informational component" to the picketing, in that the picketing was designed to advise other employees of the Ironworkers' displeasure with the applicant. But that was not its only purpose or the only intended message.

16. It has long been recognized in this Province that the affiliated building trades of the

construction industry can be expected to, and do, respect each others picket lines, without having to be expressly "told" to do so. That probability has been recognized both in practice and in law (see *Smith Brothers Construction Co. Limited v. Jones*, [1955] 4 D.L.R. 255 (H.C.), *International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al.*, 78 CLLC, 14,171, and *Acme Building and Construction Limited*, [1984] OLRB Rep. Aug. 1037). The fact is that, regardless of the nature of the labour dispute or the details of the information conveyed by the picket signs (and here the signs themselves were rather cryptic), picketing at a construction site has a collateral purpose: to induce other employees in sympathy with the picketers to refrain from crossing the picket line and going to work, as scheduled. The message is "don't cross", which, in effect, usually means "engage in a sympathy strike which will put pressure on the firm with which we have a dispute".

17. In this jurisdiction and in the context of the construction industry it really cannot be disputed that a concerted refusal to cross a picket line based upon sentiments of sympathy or solidarity is nevertheless a "strike" within the meaning of the *Labour Relations Act* (again see *Maritime Employers' Association* and *Acme Building and Construction Limited*, *supra*). Nor can it be disputed that on a construction site, a work stoppage by one trade will inevitably have spillover effects on other trades and employers working on the same site. That is why relief under section 135 of the Act (in contrast to section 92) is available to *interested persons* whose employees and activities may be disrupted by strike or picketing activity by employees of *another subcontractor* on the same site. Any residual doubts in this regard have been removed by the 1984 amendment to the *Labour Relations Act* which added the underlined words to section 135 set out in paragraph one above. The amendment makes it clear that affected employers can seek relief from the disruptive effects of illegal picketing activity.

18. The respondents claim that even though the Ironworkers have no collective agreement or collective bargaining relationship with the applicant, there is still a labour dispute which the Ironworkers have a right to bring to the attention of persons potentially interested. The respondents claim that "informational picketing" at the location of the labour dispute is an aspect of freedom of expression protected by section 2(d) of the *Canadian Charter of Rights and Freedoms*. In the respondents' submission, the pickets were merely expressing an opinion on the state of relations between the applicant and the Ironworkers' union and were making a public appeal for support. The respondents argue that any restriction on picketing, purportedly based upon sections 74 or 76 of the *Labour Relations Act* are inconsistent with *Charter guarantees* and, consequently, of no force and effect. The respondents acknowledge that there can be reasonable limitations on the rights protected by section 2(d), but urge the Board to engage in a "balancing exercise" and find that, in the circumstances of this case, a restriction on picketing is not a "reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society". The respondents point out that the evidence does not disclose that the applicant will necessarily suffer damage or economic loss should the picketing be permitted to continue. The respondents assert that the Board should not engage in an exercise of "prior restraint", and that the onus lies upon the applicant to demonstrate that limits on rights guaranteed by the *Charter* must be reasonable.

19. The submissions made by the respondents raise a variety of difficulties - not least of which is the fact that the *Labour Relations Act*, as a whole, represents an intrusion into the private market place and the relationship between employers and employees. It is not primarily aimed at the regulation of relations between the State and its citizens. It represents a complex balance of private interests, establishing rights which did not exist at common law

and, at the same time, limiting sanctions which might otherwise be subject only to common law restrictions. This is not to deny the potential application of the *Charter* to the employer-employee relationship, or to diminish the potential importance of the *Charter* or the rights which it protects. It is simply that the Board must be sensitive not only to the appeal to "constitutional rights", but also to the statutory and labour relations context under review. The Board must be mindful that the rights here asserted are not a limitation on State action, but a restriction on the ability of a private party to protect itself from economic pressures, nominally illegal, which may result in serious economic losses for which there is no obvious means of redress or recovery.

20. The problem with the respondents' submissions is that they characterize picketing solely as a means of expression or communicating information. But, as we have already noted, in ordinary circumstances (and certainly in the circumstances of this case), the picket line is much more than that. It is not just a simple exercise of a worker's freedom of expression. In the heavily unionized context of the construction industry, it is an effective trigger to a work stoppage. The very presence of a picket line will likely induce sympathetic action, quite irrespective of the nature of the information which the pickets seek to disseminate. Picketing is not just a rational appeal to persuasion. It involves an appeal for the application of immediate economic leverage in support of the picketers' cause. It is not an invitation to debate, it is a call to action; and in cases such as the present one, such action has already interfered with the conduct of the applicant's business and may well result in an unlawful work stoppage. The fact that such unlawful strike has not yet occurred (except perhaps peripherally), does not diminish the fact that that is the purpose of the picketing. The respondents are not just advertising their jurisdictional dispute. They are attempting to put economic pressure on the applicant by encouraging employees of other employers to respect the picket lines and engage in an unlawful work stoppage. And, of course, such pressure is not only nominally illegal, but is also an effort to circumvent the procedure for resolving jurisdictional disputes, established in the *Labour Relations Act*.

21. On the evidence before me, the Ironworkers' claim is no more than a naked demand that its members can do the work and that, therefore, they should do it here - even though there is no established collective bargaining relationship with the applicant employer. The Ironworkers' position is that it is "their work" and that if its jurisdictional claim is not recognized, things will be "hot and heavy" for the applicant employer.

22. For the purposes of this case, I am prepared to agree that if the *Charter* is to be applied between private parties as the respondents submit, the Board must balance the competing claims to "freedom of expression" and freedom from forms of economic pressure or coercion which are contrary to the *Labour Relations Act*. However, there are a number of factors and interests worthy of consideration. Among these are the applicant's interest in having the work done by its own employees in accordance with its established collective agreement with the Boilermakers' union. The Boilermakers' union is concerned that its members should be assigned available work, which they are capable of doing, on terms established in their collective agreement with the applicant. Other contractors on the site, including Thunder Bay, are concerned that their activities should not be disrupted because of the Ironworkers' claim against the applicant in which they are not involved. So is Domtar. Finally, any claim which the respondent union may have, can be pursued pursuant to section 91 of the *Labour Relations Act* which provides a means for resolving jurisdictional disputes. Recognition questions can be dealt with through the certification process.

23. The Ironworkers' union does not deny that a jurisdictional dispute proceeding may be launched under section 91 of the *Labour Relations Act*. From the respondents' perspective that proceeding is too slow and may not result in an outcome to their liking. Picketing is a much more effective way of pressuring the applicant to recognize the respondent union and assign work to its members.

24. Having considered the respondents' representations in the circumstances of this case, I do not think that the "*Charter* argument" can be accepted. Assuming, for the moment, that picketing involves an element of freedom of expression, I do not think that the *Charter* protects expressions which, as here, amount to a call or encouragement to engage in an unlawful strike. (I make no comments on the propriety of other means of communicating the respondents' concerns.) To the extent that sections 74 or 76 of the *Labour Relations Act* amounts to a restriction on such expressions, it is my view that such restriction is quite justifiable in accordance with the terms of the *Charter*. It follows, of course, that the picketing must be prohibited; however, nothing in this decision should be construed as an opinion on the merits of the respondent union's claim under section 91 of the *Labour Relations Act* should it seek to pursue that avenue of redress.

25. Having regard to the foregoing, the Board makes the following declarations and directions:

1. The Board finds and declares that the respondent Robert Stoppel, being an officer, official or agent of the respondent union, has counselled, procured, encouraged and threatened an unlawful strike contrary to section 74 of the *Labour Relations Act*.
2. The Board further finds and declares that Robert Stoppel, contrary to section 76(1) of the *Labour Relations Act*, has done acts (namely establishing a picket line) which he knew or ought to have known would, as a probable and reasonable consequence, induce persons working at the site of the Domtar Pulp Mill in Redrock, Ontario, to engage in an unlawful strike.
3. The Board directs that the said Robert Stoppel, and any other official of the respondent union having notice or knowledge of this direction to cease and desist from counselling, procuring, supporting, encouraging or threatening an unlawful strike; and, in particular, to refrain from picketing or authorizing, establishing or maintaining a picket line in the vicinity of the Domtar Pulp Mill in Redrock, Ontario.
4. The Board further directs that the respondent Robert Stoppel and any other person having notice or knowledge of this direction cease and desist from any acts which they know or ought to know, as a probable and reasonable consequence, will induce other persons to engage in an unlawful strike; and, in particular, that they cease and desist picketing or authorizing, establishing, maintaining or encouraging picketing activity in the vicinity of the Domtar Pulp Mill in Redrock, Ontario.

0469-85-M The United Brotherhood of Carpenters and Joiners of America, Local 1190, Applicant, v. **Karl Thier Construction Limited** and Penka Carpentry Limited, Respondents

Construction Industry Grievance - Practice and Procedure - Grievance alleging that whatever work performed by respondent contrary to collective agreement - Not specifying what work performed - Whether sufficiently particularized - Extent of particulars required in S.124 grievances

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *F. W. Murray* and *S. O'Flynn*.

APPEARANCES: *D. A. McKee* and *Tony Iannuzzi* for the applicant; *R. E. Hawkins* and *Karl Thier* for the respondents.

DECISION OF THE BOARD; June 11, 1985

1. The Board issued the following oral ruling at its hearing on June 10, 1985:

This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. The applicant and both respondents have agreed to adjourn the hearing scheduled today to a further date to be fixed by Registrar in consultation with the parties. Counsel for the applicant requests the Board to direct Karl Thier, a principal of both respondents, to comply with the summons to witness issued by the Board that was served on him by the applicant. Counsel for the respondents demands particulars of the violations alleged by the grievance before having his client comply with the summons to witness.

The respondents Penka Carpentry Limited and Karl Thier Construction Limited were declared to be one employer by the Board, (differently constituted) pursuant to section 1(4) of the Act. The applicant's grievance claims the collective agreement between it and Karl Thier Construction Limited, which, by virtue of the Board's section 1(4) declaration, is binding on Penka Carpentry Limited, has been violated from August 1984 to the present time. The applicant determined that Penka Carpentry Limited received a sub-contract from Bramalea Construction and it alleged that Penka Carpentry Limited performed that work with persons who were not members of the applicant.

The Board's approach to dealing with claims for particulars in section 124 proceedings was set out in *Master Insulation Co. Ltd.*, [1981] OLRB Rep. Jan. 94 at paragraph 25:

"In arguing his case, counsel for Master claimed that the broad cast of the grievance and the sweeping nature of the summons *duces tecum* combined with the Board's process permitted Local 95 to perfect its grievance during the course of the Board's proceedings. In other words, counsel was claiming that Local 95 did not have any knowledge

of specific events about which it could grieve until it flushed them out by having Master come and testify against its own interests. In his view, therefore, the Board should dismiss the grievance. The Board is not without concern about grievances referred to it which only broadly allege violation of the collective agreement, even when they are specific as to the sections alleged to have been breached. It will not permit its broad powers and its procedures to be abused by a party seeking to learn whether in fact it has a grievance. Any party which refers a grievance that is so broadly stated as to raise that suspicion runs the risk either of delay in having its grievance determined or having the Board rule that it is so lacking in specificity as to be not arbitrable. On the other hand, the Board must be sensitive to the realities of the construction industry with its scattered job sites and the large number of small employers and the difficulties which these conditions create even for a trade union which attempts diligently and assiduously to assert its bargaining rights and police its collective agreements. There are many ways by which an employer who is bent on ignoring his responsibility under a collective agreement can obscure his presence on a job site. This makes it difficult for a union to know whether an employer with whom it has an agreement is performing work at all. Once a union learns of an employer's presence on a job, it may be able only to determine that the employer is performing work for which the union claims jurisdiction under the collective agreement. That may be the extent of the information on which it must rely to file a grievance. In these circumstances, the Board cannot set hard and fast conditions for specificity and particularity but must look at each grievance on its merits if it is challenged as being too lacking in its particulars or not specific enough in stating the alleged violation."

In our view, the grievance with respect to Penka Carpentry Limited's activities is sufficiently particularized since the applicant alleges that whatever work Penka Carpentry Limited performed was performed contrary to the collective agreement. The applicant need not specify what work it believes Penka Carpentry Limited has performed, since Penka has never been a party to the collective agreement which the applicant has alleged was violated. Rather, the summons to witness relating to Penka Carpentry Limited's activities since its inception in August, 1984 must be complied with.

With respect to the respondent Karl Thier Construction Limited, the applicant asserted at the hearing that the respondent Karl Thier Construction Limited performed work in Brampton between January and March 1985. The applicant's claim in respect of Karl Thier Construction Limited therefore relates only to that period of time and to that location. Mr. Thier's response to the summons to witness in respect of Karl Thier Construction Limited should therefore relate to that period of time and that location only. If the applicant asserts that Karl Thier Construction Limited violated the collective agreement at other times after August 1984, it must particularize those claims since it has been aware of the existence of Karl Thier Construction Limited and is in a position to review more easily the activities of that entity since that company was a party to the collective agreement with it.

2. Having regard to the agreement of the parties, this matter is adjourned to a date to be fixed by the Registrar in consultation with the parties.
 3. This panel of the Board is not seized with this matter.
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3462-84-U Anisia Mordowanec, Complainant, v. Ontario Nurses Association (ONA), Respondent

Duty of Fair Representation - Unfair Labour Practice - Prior Board decision finding both employer and union violated Act - Employer seeking judicial review of decision against itself - Union acting on legal advice deciding to not participate in judicial review proceeding - Not providing complainant with funds to retain own counsel - Whether breach of representation duty

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *P. Grasso* and *R. J. Gallivan*.

APPEARANCES: *Mary Cornish* for complainant; *D. F. O. Hersey*, *Q. C.* and *Dan Anderson* for the respondent.

DECISION OF THE BOARD; June 14, 1985

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent union has contravened section 68 of the Act. The alleged breach of section 68 is based upon the union's decision not to take an active role in a judicial review of an earlier Board proceeding involving the complainant, and not to provide her with funds so that she could retain her own counsel. Section 68 reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. In order to appreciate the context in which the present case arises, it may be useful to sketch in some of the background and the issues resolved in the earlier Board proceeding (Board Files 2287-83-U and 2526-83-U) which is now before the Court. For ease of reference, the respondent, the Ontario Nurses' Association, will be referred to as "ONA", and Windsor Western Hospital will be referred to simply as "the Hospital". The facts set out below are those established by the Board in the earlier case. (See, [1984] OLRB Rep. Nov. 1643.)

II

3. The complainant is a registered nurse. She has worked for the Hospital for some 27 years. On May 31, 1982, she was suspended pending investigation of alleged improper treatment of a patient.

4. At the time of the alleged wrongdoing, the complainant's charge nurse was Ms.

Mary DeByl-Wowchuk. Ms. DeByl-Wowchuk was also the local union president. In her capacity as charge nurse, she filed critical reports questioning the complainant's competence. In her capacity as union president, she attended a "disciplinary interview" leading to the complainant's termination. The quality of representation provided at the disciplinary meeting was the basis for a complaint before this Board alleging that ONA had breached its duty of fair representation (Board File 2287-83-U).

5. The disciplinary meeting took place on June 9, 1982. The complainant was required to attend. Under the applicable collective agreement the complainant was clearly entitled to union representation. Ms. DeByl-Wowchuk was the only union official present at the meeting, however, it would be somewhat misleading to describe her as the complainant's "union representative". Ms. DeByl-Wowchuk took no active part in the meeting. She did not attempt to advise or represent the complainant. Ms. DeByl-Wowchuk only took notes.

6. At the meeting, the Hospital misled the complainant into believing that if she signed a resignation letter there would be no negative report to the College of Nurses. That assertion was false. The Hospital did report her to the College of Nurses, which conducted an enquiry into the charges of professional misconduct and incompetence. Ms. DeByl-Wowchuk gave evidence against the complainant. The charges were dismissed.

7. At the disciplinary meeting on June 9, 1982, the complainant was upset. She requested an adjournment so that she could talk to her husband or a lawyer. She requested a delay until that afternoon when Ms. Jan Davidson, a union employee relations officer, would be available to represent her. The complainant had already spoken to Ms. Davidson and arranged to meet her later that day. The complainant did not want to be represented by Ms. DeByl-Wowchuk. Ms. DeByl-Wowchuk was not impartial. The Hospital insisted on proceeding immediately.

8. Ms. DeByl-Wowchuk was in a conflict of interest position. She could not, and did not, assist or represent the complainant. Ms. Davidson would have been able to supply such union representation, but the Hospital was not prepared to await her arrival. It is difficult to resist the inference that the Hospital knew that if the complainant had Ms. Davidson's assistance, it would not be able to successfully mislead her and obtain a resignation letter; and, if it proceeded with a dismissal, it might have some difficulty establishing "just cause" for the discharge of an employee with twenty-seven years' service. The Hospital was content to engineer, and exploit, a situation in which the complainant was without any actual union representation. In any event, that was the unanimous opinion of the panel of this Board which heard the earlier case. The Hospital chose to call no evidence, and thus tendered no explanation as to why it could not await the arrival, later that afternoon, of the union representative the complainant had so clearly requested.

9. The resignation letter was signed late in the morning of June 9, 1982. That afternoon, the complainant did have occasion to discuss the matter with Ms. Davidson. That evening, the complainant delivered to the Hospital a written revocation of her resignation. The Hospital refused to accept it. The Hospital's response was that even if the complainant had not resigned she was terminated for cause.

10. Thereafter, the union filed a grievance on the complainant's behalf. The grievance was ultimately taken to arbitration. Unfortunately for the complainant, the arbitration board

ruled that because of the resignation letter it had no jurisdiction to determine whether the Hospital had "just cause" to terminate the complainant's employment. She had "quit" voluntarily.

11. On January 5, 1984, the complainant filed an unfair labour practice complaint alleging that the union had breached its duty of fair representation. This complaint was later amended to include an alleged breach of sections 64 and 66 of the Act by the employer Hospital. The complaint against ONA was based upon the failure of ONA to provide proper representation at the disciplinary meeting. In addition, the union filed its own complaint against the employer Hospital alleging breaches of sections 64 and 66. The unfair labour practice complaints against the Hospital were both based upon the Hospital's purported interference with the complainant's statutory right to union representation at the disciplinary meeting. These two related cases (i.e. against ONA and the Hospital) were eventually heard by the same panel of the Board. Both were successful.

12. For reasons more particularly set out in the Board decision of November 9, 1984, the Board concluded that the union had breached its obligation under section 68 of the Act to properly represent the complainant at a time when the complainant's critical job interests were at stake. However, the Board also found that this absence of representation was brought about, in part, by the actions of the Hospital. The Board held that the Hospital had interfered with the complainant's *statutory right* to union representation which she had clearly requested and which, in practical terms, had been expressly denied. The Board cited with approval certain comments in *J. Weingarten Inc. and Retail Clerks, Local 455*, (1973) 485 F. 2d 1135, 84 LRRM 2436 (U.S.C.A. - 5th Circuit, *certiorari* granted (1975) 430 U.S. 251 (Supreme Court), where the Supreme Court of the United States held that language similar to that found in the *Labour Relations Act* guaranteed an employee's right, upon request, to have union representation at a disciplinary meeting where his critical job interests are at stake. [See generally: C.J. Morris, Editor, *The Developing Labour Law*, B.N.A. Washington, 1983 at pp. 149-156. See also: the decision of the Quebec Labour Court in *Chapdelaine v. Emballage Domtar Ltee*, 84 CLLC 14,013 where that tribunal reached the same conclusion.] The Board did not explore the full ambit of this statutory right to representation (which has been well established in the United States), but observed that it was not for the employer to decide who would be the employee's representative at a disciplinary hearing, or to raise barriers to union representation which cannot be reasonably justified. No justification was advanced, because, as noted, the Hospital called no evidence.

13. The Board was then faced with the dilemma of how to fashion an appropriate remedy for these combined breaches of the Act. In a typical unfair labour practice discharge, the Board normally directs the reinstatement of the aggrieved employee with compensation for lost wages. However, the circumstances before the Board were somewhat novel. It was a little unusual for a termination to result from what might be described as a double illegality. Nor was it by any means clear how the liability should be apportioned between ONA and the Hospital, when it was arguable that, but for the Hospital's default, there might have been no termination, and any failure of representation on ONA's part would have been rectified. Finally, there was the matter of the complainant's own delay in launching these unfair labour practice complaints. Her discharge occurred in June of 1982, but it was not until January, 1984 that she sought to pursue any remedy before this Board against her employer or her bargaining agent. In a preliminary ruling, the Board decided that this delay would not be an absolute bar to a consideration of her complaint, but might well be a factor to be considered

if the complaint were ultimately successful and the Board had to deal with the question of remedy or compensation.

14. Ultimately the Board decided that the crux of the problem was the termination letter, which it found, would not have been tendered, but for the illegal conduct of both the union and the Hospital. Without that termination letter, upon which the arbitration board relied, the employer would have had to rely upon its alternative position that the complainant had been discharged for cause. Whether or not that position could be sustained would depend upon the strength of the employer's case against her. While the opinion of the College of Nurses might suggest the likely result, it would not be binding upon an arbitration board which would have to make up its own mind based upon the evidence before it.

15. The collective agreement envisages arbitration as the appropriate mechanism for resolving such questions and, while the Board might well have decided to deal with all of these issues itself, it decided that the more appropriate route was to direct that the propriety of the complainant's discharge should be determined by a board of arbitration constituted pursuant to the terms of the collective agreement. The Board remained seized in the event that there was any difficulty in the implementation of this remedial order, and in the event that the complainant was successful at arbitration there was some dispute with respect to the amount or allocation of compensation (again, bearing in mind the complainant's own delay in launching these proceedings). The relevant portion of the earlier decision reads as follows:

35. The Hospital extracted a letter of resignation from Mrs. Mordowanec by unlawful means (and in circumstances where the union breached its statutory duty of fair representation to her), successfully relied on that letter before an arbitration board that was unaware that it had been obtained by illegal means and now seeks to shield itself from any attempt by this Board to go behind the award of that board of arbitration. Just as the Board and the Court in *Traugott* refused to give any force or effect to a document obtained by illegal means, so also we are not prepared to give any force or effect to the letter of resignation obtained by illegal means or the arbitration award that relied on that letter in refusing to provide Mrs. Mordowanec with a hearing on the merits. Mrs. Mordowanec, a nurse with 27 years of service with the Hospital, is entitled to be put in the position she would have been in had it not been for the breach. We have the authority under section 89(4) of the Act to direct a hearing on the merits and in all the circumstances we hereby exercise our discretion to direct, notwithstanding the time limits in the collective agreement, that Mrs. Mordowanec's grievance with respect to her termination of employment be heard on the merits. The parties are directed to forthwith appoint their respective nominees to the arbitration board and to recommence the arbitration process established under the collective agreement for the purpose of determining if the Hospital had just cause to terminate the employment of Mrs. Mordowanec.

36. The Board will remain seized in the event of any difficulty with the implementation of our remedial order, and in addition, we will remain seized in the event that Mrs. Mordowanec is successful at arbitration and there is some dispute with respect to compensation.

[emphasis added]

16. But the Board decision was not the end of the matter. The Hospital refused to comply with the Board's order. The Hospital refused to appoint its nominee to the board of arbitration. The Hospital takes the position that the Board decision is wrong, and that it should not have to justify its decision to terminate the complainant's employment.

17. The Hospital does not deny that it has failed to comply with the Board's order. The

Hospital says that it has applied for judicial review. However, the Hospital has not sought a “stay” of the Board’s direction as it is entitled to do pursuant to section 4 of the *Judicial Review Procedure Act*. Nor has it asserted that, pursuant to section 6, the case should be dealt with expeditiously by a single judge of the High Court. Meanwhile, of course, more than six months after a Board decision in her favour, almost three years after her termination, and despite a decision by the College of Nurses dismissing the allegations of incompetence and professional misconduct, the complainant remains unemployed, awaiting the establishment of a board of arbitration which will determine whether there was just cause for her termination.

18. Given the crowded Court calendar and the vagaries of litigation, it is difficult to predict when the Divisional Court might hear the application for judicial review (leaving aside any question of further appeals). The fall of 1985 appears to be a reasonable assumption. When the Court might render a decision is difficult to predict.

19. It is equally difficult to predict the results or the potential judicial outcomes. For example, if the Court were to hold that the arbitration remedy was beyond the Board’s jurisdiction, but did not disturb the finding that the Hospital breached section 64, the Board might have to determine what remedy, if any, should flow where the union’s illegality set the stage for an employee discharge, but the employer’s illegal conduct effectively prevented a subsequent rectification of that problem. Indeed, how would one apportion liability if the Hospital’s judicial review failed and the complainant’s grievance succeeded - particularly given her own delay in seeking relief before this Board? These questions are novel, and it is probably inappropriate to speculate as to how they might be resolved.

20. With this background, we turn to the issues in the instant case.

III

21. The Hospital filed its application for judicial review in late January, 1984. In accordance with its usual practice, and pursuant to section 9 of the *Judicial Review Procedure Act*, the Ontario Labour Relations Board, by its counsel, entered an appearance so that it could address the Court on any questions concerning the Board’s jurisdiction and the application, if any, of the “privative clause” in section 108 of the Act. As we have already mentioned, ONA has decided not to take an active role in the judicial review proceedings. It is not disputed that, because of the complainant’s financial circumstances, she may not be able to retain counsel unless she is able to obtain the financial assistance of the Legal Aid Plan.

22. Although ONA may not be supporting the employer, attacking the adverse finding against ONA itself, or even taking an active role in the judicial review proceeding, ONA is not a disinterested party. Because the Hospital attacks the propriety of the Board’s remedy, as well as its interpretation of the statute, ONA may well be left in a position where, if the Hospital is totally successful, ONA will bear *full responsibility* for any compensation ultimately payable to the complainant. Alternatively, if the Board remedy is set aside, but not its interpretation of section 64, ONA may subsequently be embroiled in further litigation before this Board to determine what alternative remedy would be appropriate. ONA is apparently prepared to take those risks.

23. Dan Anderson testified that ordinarily ONA took an active part in judicial review proceedings arising from arbitration awards favourable to the union and employee position. He was unable to recall any judicial review applications involving the Labour Relations Board. Moreover, in this case, ONA is in a somewhat unusual position. It was a co-respondent in the impugned proceedings. It was found by the Board to have breached the Act. It may ultimately be responsible for some portion of the compensation potentially payable to the complainant. Given the unusual circumstances, ONA sought the advice of its counsel, D.F.O. Hersey, Q.C. of the Toronto firm of McCarthy & McCarthy.

24. Mr. Hersey advised ONA that, in his view, the Hospital's application for judicial review was without merit and would not succeed. In Mr. Hersey's opinion, the grounds for judicial review raised by the Hospital were unlikely to be accepted by the Court as sufficient to warrant quashing the Board's decision. He also pointed out that the Labour Relations Board routinely retained experienced counsel to address any questions concerning the Board's jurisdiction or any assertion that the Board had exceeded its jurisdiction. In view of the privative clause, jurisdictional error was the only basis for review. Mr. Hersey advised that, in the circumstances, ONA's representations would be superfluous and a waste of money. For much the same reason, ONA also decided that it did not have any obligation to finance the complainant's participation in the judicial review of the Board decision, anymore than it had the responsibility to pay her legal costs for the successful proceeding before the Labour Relations Board itself.

25. We are a little troubled by ONA's decision not to take part in the judicial review proceeding. In so doing, ONA may be contributing to the rather unusual situation in which only the Labour Relations Board and the Hospital will be making representations on the application for judicial review. We do not think that the role of Board counsel is analogous to that of counsel for other interested parties, or that the submissions of Board counsel can or will necessarily be the same. Regardless of the experience of Board counsel, he will be responding to the Board's instructions, not those of ONA, and may well be more circumscribed in his submissions than ONA would prefer. But the issue before this panel of the Board is not whether we agree with the wisdom of ONA's decision, or whether we would have counselled or taken a different course of action. The question before us is whether what ONA has done can be characterized as "arbitrary, discriminatory, or in bad faith". We do not think that it can.

26. Dealing first with ONA's direct participation in the judicial review proceedings, we repeat that the circumstances are somewhat unusual, and it is not at all inappropriate or surprising that ONA would seek the advice of counsel before making a decision. Counsel's advice was obtained and followed, and whether it was right or wrong, we do not think the union's conduct can be characterized as arbitrary, or in bad faith. Nor do the circumstances of a novel situation support the assertion of discrimination. There is no indication of subjective ill will or bad faith on the part of ONA or its officials. On the contrary, ONA has already been to arbitration once on the complainant's behalf, and ONA is actively pursuing the complainant's claim in the forum and in accordance with the procedure contemplated by the earlier Board decision. ONA does not stand to gain from its decision not to participate in the judicial review (or to finance the complainant for that matter). If anything, ONA is merely increasing its "downside risk". This is not to say that a lawyer's opinion will always provide a complete defence to a section 68 allegation, or that retaining counsel will provide a shield

in every conceivable circumstance. There may well be extraordinary cases in which the sins of a solicitor will be visited upon his union client under section 68 of the Act, leaving the union with whatever remedies may be available to it in the Civil Courts. This is not one of them.

27. If ONA is not going to take an active role in the judicial review proceedings, is it under an obligation to finance the complainant's own participation? This is also a difficult question, particularly where, as here, the question might never have arisen had the union been more diligent in the first place. It is vaguely troubling that neither ONA nor the impecunious complainant may be present in Court to defend the process of arbitration to which ONA is prepared to submit, and which in collateral proceedings (see Board File 3080-84-M) it seeks to expeditiously engage. However it is not alleged, and cannot be said that ONA is intentionally trying to "throw the case", or facilitate a decision in favour of the employer. Here it appears that any "victory" by the employer in the application for judicial review will most likely complicate ONA's own position, and increase its potential financial liability. As things now stand, the Hospital is a co-respondent which could arguably bear at least some financial responsibility for the complainant's termination. If the Hospital is successful, through judicial review, in extricating itself entirely from the process, ONA may well be left with increased or perhaps sole responsibility for what has occurred. Accordingly, it is difficult to view ONA's decision not to participate or finance the complainant's independent participation as a scheme to thwart her interests, or the product of bad faith or discrimination.

28. The complainant does not assert that she is entitled to her "costs" of the successful complaint before the Labour Relations Board. The Board has a well-established policy of not awarding "costs" - not only because the statute does not contemplate "costs", but also because the Board would have no jurisdiction to award them to a successful respondent. But if the complainant is not entitled to her costs of the successful proceeding before this Board, why is she entitled to demand that ONA pay her legal expenses for a judicial review flowing from the Board proceeding or for any subsequent appeal? The issue is underlined by the fact that if ONA wished to do so, it could itself have applied for judicial review of those Board findings adverse to its interest, and would then have been arrayed against the complainant in the same way and in the same forum as the employer. Could the complainant then claim that she was entitled to call upon ONA to provide funds for counsel to intervene in the Divisional Court in opposition to ONA's application? We do not think so. If ONA is not required to subsidize the complainant's legal fees when ONA itself is aligned in interest against her, why should ONA have a higher obligation when, on the advice of counsel, it is taking a purportedly neutral stance?

29. The statutory duty of fair representation was initially conceived as a kind of "counterbalance" flowing from the union's exclusive bargaining agency granted by statute (see *Vaca v. Sipes*, (1967) 386 U.S. 1971 (U.S.S.C.) and *Walter Princldomu v. Canadian Union of Public Employees, Local 1,000 - Ontario Hydro Employees' Union*, [1975] OLRB Rep. May 444). In the collective bargaining world the employee does not have the right to bargain his own individual terms and conditions of employment. Nor does he have the right to enforce or insist upon the enforcement of the terms of the collective agreement to which he is not a signatory party. Under our legislative scheme, those rights are vested exclusively in the trade union. The union is his statutory agent. In this context, it is hardly surprising that the Legislature would determine that the union must exercise its "monopoly position" in a manner that is neither arbitrary, discriminatory nor in bad faith. The statutory duty of

fair representation is the natural concomitant of the union's position as *exclusive* bargaining agent. If the employee is not to be able to assert these collectively bargained rights on his own, he should at least have the assurance that his statutory bargaining agent will represent him fairly.

30. Here the situation is somewhat different. Apart from questions of funding, it does not appear that the complainant's right to participate in the application for judicial review depends upon or can be limited by the status of her union as exclusive bargaining agent any more than the union could have limited her right to bring an unfair labour practice complaint against her employer (as she, in fact, did). She may not be able to bargain individually with her employer, and she may not be able to insist on enforcement of an alleged violation of the collective agreement, but the union, as her statutory bargaining agent, cannot, and is not seeking to foreclose her participation in the judicial review proceeding. She has that right as a matter of law and quite apart from the *Labour Relations Act* and the union's statutory role. Whatever the general ambit of the union's representation obligation under section 68 of the Act (and we need make no decision in that regard), it does not extend in this case to underwriting the costs of her legal counsel in the pending judicial review proceedings.

31. For the foregoing reasons, this complaint is dismissed.

1666-84-M The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local Union 527, Applicant, v. The Electrical Power Systems Construction Association and **Ontario Hydro**, Respondent

Construction Industry Grievance - Room and Board allowance mistakenly paid to employee due to incorrect information provided by employee - Whether employer can set-off sum overpaid against wages earned by employee - Effect of prohibition against deduction from wages in Employment Standards Act

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and S. O'Flynn.

APPEARANCES: Malcolm Boyle, Alexander Ahee and Jack Porter for the applicant; Paul S. Jarvis and John Tomlinson for the respondent.

DECISION OF THE BOARD; June 27, 1985

1. This is an arbitration proceeding under section 124 of the *Labour Relations Act*. It is brought on behalf of Walter MacDonald ("the grievor"), a former employee of the respondent employer who quit his employment on June 1, 1984. The union claims that in the pay period immediately preceding his termination, the grievor earned, and should have been paid, wages in the sum of \$756.96. The union asserts that these wages were wrongfully withheld, and seeks an order directing payment to the aggrieved employee. The respondent employer argues that, in the circumstances of this case, it was entitled to withhold payment.

2. A hearing in this matter was held in Toronto on February 19, 1985. At the hearing, the parties filed the following agreed statement of fact:

AGREED STATEMENT OF FACTS

1. The Grievor, Walter MacDonald, quit his employment as an instrument welder with Ontario Hydro on June 1, 1984.

2. At that time, the sum of \$7,060.00 was owing to Ontario Hydro from Walter MacDonald. This money was paid mistakenly to MacDonald for Room and Board allowance as a result of the incorrect fact represented to Ontario Hydro by MacDonald that he had a regular residence in Nova Scotia.

3. On or about June 7, 1984, Walter MacDonald did not receive:

(i) for the period ending June 6, 1984;

\$102.77, being wages of \$105.54 less statutory deductions and holiday and vacation pay of \$10.55 less statutory deductions,

(ii) for the period ending May 30, 1984;

\$654.19, being wages of \$367.63 less statutory deductions and holiday and vacation pay of \$378.19 less statutory deductions.

4. The admissions in paragraphs 2 and 3 above shall not be to the prejudice of either party in any civil proceedings and are made solely for the purposes of the proceedings before the Ontario Labour Relations Board in Board File No. 1666-84-M.

5. The parties agree that in the event the grievance is successful, the maximum liability of the Respondent shall be \$756.96 plus interest. The award of interest shall be the subject of argument between the parties.

In addition, the Board was advised that the respondent has commenced an action against the grievor, in the Province of Nova Scotia (where he now resides), for the recovery of the "overpayment" mentioned in paragraph 2 of the agreed statement of fact. The parties did not clarify whether the misrepresentation of fact referred to in paragraph 2, was innocent or negligent or fraudulent. The meaning of "regular residence" is defined in the collective agreement and is quite complex (see article 29).

3. The collective agreement provides, quite clearly, that an employee who voluntarily terminates his employment will be provided his final pay on the next regular pay day (see

section 15). The final pay must include, *inter alia*. "vacation and recognized holiday pay". This latter term is defined in article 18, which fixes the rate at 10% of vacationable gross earnings. It is not disputed that the "wages" in issue here, were "earned" by the grievor, in the sense that he performed work for which he would ordinarily be entitled to be paid, were it not for the overpayment of room and board allowance. The question is whether the employer could properly withhold payment because of its much greater claim against him.

4. The union argues that the collective agreement spells out the terms of the "wage - work" bargain, and that, having performed certain work, the grievor is entitled to be paid for it. In the union's submission, the company cannot unilaterally "set off" against, or deduct from the employee's wages some amount which the employer claims is owed to it - even if that claim is a valid one, which could be sustained in a court of law. The union points to the following provisions of the *Employment Standards Act* and the regulations made thereunder:

• • •

7.(1) An employer shall pay to an employee all wages to which an employee is entitled under,

- (a) an employment standard; or
- (b) a right, benefit, term or condition of employment under a contract of employment, oral or written, express or implied, that prevails over an employment standard,

in cash or by cheque.

(2) All wages shall be paid at the work place of the employee, or at a place agreed upon by the employer and the employee.

(3) All wages due and owing to an employee shall be paid by an employer on the regular pay day of the employee as established by the practice of the employer.

(4) Any payment to which an employee is entitled upon termination of employment shall be paid by the employer to the employee not later than seven days after termination of employment.

8. *Except as permitted by the regulation, no employer shall claim a set-off against wages, make a claim against wages for liquidated or unliquidated damages or retain, cause to be returned to himself, or accept, directly or indirectly, any wages payable to an employee.*

DEDUCTIONS, ETCETERA, FROM WAGES

15.-(1) Notwithstanding section 8 of the Act, an employer may set off against, deduct from, claim or make a claim against or retain or accept the wages of an employee where,

- (a) a statute so provides;
- (b) an order or judgment of a court so requires; or
- (c) subject to subsection (2), a written authorization of the employee so permits or directs.

(2) No written authorization of an employee shall entitle an employer to set off against, deduct from, retain, claim or accept wages for faulty workmanship, or for cash shortages or loss of property of the employer where a person other than the employee has access to the cash or property.

(3) Where an employee has been given or paid a vacation with pay or payment for vacation in excess of the requirements of Part VIII of the Act, no employer shall set off or deduct such

excess against or from any vacation with pay, pay for vacation, or payment under section 31 of the Act.

[emphasis added]

5. The respondent employer argues in reply, that, in fact, there are no wages owing to the grievor, and, therefore, no wages which the employer is required to pay. The employer notes that under section 1(1)(p) of the *Employment Standards Act* wages are defined as follows:

1.-(1) In this Act,

• • •

(p) “wages” means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act, and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(i) tips and other gratuities,

(ii) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(iii) travelling allowances or expenses,

(iv) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies.

The admitted overpayment is an overpayment of *wages*. The employer asserts that the grievor has already received sums (albeit by mistake) in respect of “*wages*” far greater than the wage payment which he now claims. The employer contends that under both the collective agreement and the *Employment Standards Act*, there are no “wages owing”, because, in effect, the grievor has already been paid, *in advance*, and by mistake, an amount much greater than the sum which he now demands. If anything, he owes the employer a substantial sum in respect of wages mistakenly paid. The employer argues that the *Employment Standards Act* can have no application where, as here, its counter claim is itself in respect of “wages”, and the overpayment is admitted. How can the grievor demand a wage payment when he has already been substantially overpaid?

6. We have considered the submissions which were so thoroughly, thoughtfully, and persuasively made by counsel for the respondent employer; however, upon reflection, we do not think that the respondent’s position can be accepted. The respondent’s assertion (and defence to this wage claim) is expressly prohibited by section 8 of the *Employment Standards Act*.

7. In our view, section 8 is a piece of remedial legislation with a clear and specific purpose: employees who work for wages are entitled to be paid for the work they perform, and in the absence of statutory authority or written authorization, any claim whatsoever by their employer to all or part of that money must be asserted in a court of law. It is difficult to conceive of a clearer, more explicit or more comprehensive prohibition than the one found in section 8, which is clearly intended to prevent *any* unilateral deduction from, or retention

of, wages, *directly or indirectly*, based upon an employer claim against his employee. There is no special status for employer claims in respect of past wage payments, nor could there be without opening the door to the very mischief which section 8 was designed to avoid: shifting the onus to the employee - usually the weaker party in the relationship - to initiate action in order to recover what his labour has earned but his employer refuses to pay. Section 8 reverses the common law position, and shifts the onus to the employer to establish to the satisfaction *of a court*, not only that it is entitled to the payment, but also the terms on which such payment should be made. For example; even if an employee's debt were acknowledged in court, it is doubtful whether the court would permit a creditor to confiscate that employee's *entire income* for one or more pay periods. The *Wages Act* R.S.O., 1980 c. 526 limits the amount of a debtor's wages which may be subject to seizure or attachment without express Court authorization. Here the respondent asserts the amount it may seize and retain is 100%. Indeed, if the respondent's submissions are correct (and the employment relationship were maintained), the respondent could withhold payment of *any* wages to the grievor for several months until he had "worked off" what the respondent claims is owed to it. It could pay the employee 70% of his wages, 30% of his wages or nothing at all. And, of course, all of this is based upon the *fiction* that certain sums paid by mistake should be notionally treated as a "prepayment" of wages to be earned later, in different circumstances, for different services rendered, and over a different (and uncertain) time period, from which the respondent is entitled to deduct amounts which it determines are appropriate.

8. The thrust of section 8 is that a creditor should not be in a privileged position because he is the debtor's employer. His practical control over the payment of employee wages does not permit him to make unilateral deductions from those wages. While we have some sympathy for the employer's dilemma, it is precisely what the Legislature envisaged: the employer cannot unilaterally retain wages, but must seek its remedies in court, as it is apparently now doing. Nor do we think that we can simply take it for granted that the employer's claim against the grievor will be successful. As counsel correctly pointed out, there may be a legal distinction between payments made pursuant to a mistake of fact or a mistake of law, and it might be significant whether the overpayments resulted from an innocent misrepresentation or misunderstanding on the employee's part, or from real fraud. In any event, in accordance with the scheme envisaged by the *Employment Standards Act*, those are matters best left to a court to determine.

9. We find (and it is not disputed) that the grievor has performed certain work for which he is entitled to claim wages. We find further that the respondent employer has no right to withhold payment of those wages in the sum of \$756.96. The collective agreement provides for payment and this amount must therefore be paid. Accordingly, the respondent employer is directed to remit this sum to the grievor forthwith, together with interest from June 7, 1984 to the date hereof. The Board calculates that the amount to be paid to the grievor as of the date hereof, is \$855.36.

2113-84-U United Steelworkers of America and its Local 9011, Complainant, v. Radio Shack Division Tandy Electronics Limited, Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Union rejecting employer's last offer and commencing lawful strike - Purporting to accept last offer as 6 months deadline approached - Employer claiming offer no longer outstanding and seeking further amendments - Not permitting employees to return to work - Whether employer conduct lawful

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. Collins*.

APPEARANCES: *James Hayes, Bernard Hanson and Sheila McIntyre* for the complainant; *L. Bertuzzi, M. J. Addario and W. A. Potter* for the respondent.

DECISION OF ROBERT D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; June 14, 1985

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "Union") alleges that the respondent (also referred to in this decision as the "Company") has contravened sections 15, 50, 64, 66, 70, and 73 of the Act.

2. The principal matters initially covered by the complaint (as supplemented by Union counsel's letter dated November 29, 1984) were: (1) the Company's refusal to sign a collective agreement embodying the terms of a Company offer of May 2, 1984, which the Union purported to accept on October 25, 1984 (the "bargaining issue"); (2) the Company's discharge of five and suspension of two bargaining unit employees on October 25, 1984; (3) the Company's alleged delay in reinstating employees pursuant to section 73 of the Act; (4) the Company's alleged discriminatory treatment of strikers following their return to work; and (5) the contracting out of certain work by the Company. However, at the commencement of the hearing of this complaint on December 19, 1984, Union counsel advised the Board that his client wished to revise the complaint by eliminating the paragraphs pertaining to "contracting out". Having permitted that amendment and having determined that the parties were in agreement that the Company would proceed first with its evidence on all aspects of the case, the Board proceeded to hear the evidence of William Potter, the respondent's Employee Relations Director.

3. Examination in chief of Mr. Potter by Company counsel continued on December 21, 1984 and was to further continue on March 20, 1985. However, on that day, after hearing the submissions of counsel with respect to the complainant's request that the "bargaining issue" be severed and dealt with by the Board as a discrete issue prior to hearing and determining the other aspects of the complaint, the Board ruled as follows (in a unanimous oral ruling):

We are prepared to permit the "bargaining issue" to be severed but, in doing so, will sever all of the allegations in Mr. Hayes' letter of November 29, 1984. Thus, paragraph 4 of that letter will become one of the matters which is deferred, along with the other outstanding matters.

We will also permit Mr. Bertuzzi to elect whether he wishes to proceed with the respondent's evidence or to have the Union proceed with its evidence in chief before adducing any further evidence on behalf of the respondent.

On March 20, 1985, the Board, without objection by the respondent, also permitted the Union to withdraw the portion of its complaint pertaining to the Company's alleged delay in reinstating employees pursuant to section 73 of the Act.

4. At the continuation of hearing on March 29, 1985, Company counsel advised the Board that he had elected to have the Union proceed with its evidence in chief (concerning the "bargaining issue") before adducing any further evidence through Mr. Potter or any other witness. Accordingly, the Board proceeded to hear the evidence of David Patterson, the Director of District 6 of the respondent, and Frank Berry, the Union Staff Representative responsible for the bargaining unit in question. At the continuation of hearing on April 18, 1985, Mr. Potter was recalled to complete the Company's evidence concerning the "bargaining issue". On the following day the Board heard argument on that issue and reserved its decision in order to afford it an opportunity to carefully review the evidence and the jurisprudence to which it was referred by counsel.

5. In addition to the testimony of the aforementioned three witnesses, the Board also has before it 17 exhibits which were entered during the course of these proceedings. In making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of the parties concerning that evidence, and such factors as the firmness of the the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case and what inferences may reasonably be drawn from the totality of the evidence.

6. The relationship between the complainant and the respondent dates back to November of 1978. That relationship got off to a very rocky start as a result of a series of flagrant unfair labour practices engaged in by the respondent, as described in the following passages from the Board's decision dated December 5, 1979 in File No. 1004-79-U (reported in [1979] OLRB Rep. Dec. 1220):

2. The Complainant brings this complaint on behalf of itself and all employees in the bargaining units it represents at the Respondent's distribution centre in Barrie, Ontario. It complains that the employees and their union have been dealt with by the Respondent contrary to sections 14, 56, 58, 59, and 61 [now sections 15, 64, 66, 67, and 70] of *The Labour Relations Act*...

5. The history of this case is considerable. Radio Shack is a division of Tandy Electronics Limited (Alberta) which in turn is a wholly owned subsidiary of Tandy Corporation, Fort Worth, Texas - a company engaged in the manufacturing and retailing of stereo and other electronic equipment on a worldwide basis. This collective bargaining relationship is very recent in origin. It is also fair to say that its establishment was subject to considerable litigation before this Board and the courts. The present application arises out of the Complainant's attempt to negotiate a first collective agreement with the Respondent.

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7. The history of this application begins with a decision of the Board dated September 27, 1978, written reasons being issued October 12, 1978 (Board File No. 274-78-U). That decision dealt with complaints under section 79 [now section 89], wherein it was alleged that five employees had been dismissed by the Respondent contrary to sections 56, 58 and 61 of *The Labour Relations Act*. Evidence before that panel, and confirmed by evidence before this panel, established that the complainant's campaign to organize the employees of the Respondent at its Barrie facility formally began in March of 1978. Meetings with employees were held on April 17th, 24th and May 1st of 1978. The employees were terminated on May 3rd. The Board found that two of these employees (Henry North and Stephen Gradon) had been discharged in contravention of *The Labour Relations Act*. Both employees were reinstated into the employ of the respondent with the direction that they be compensated for their monetary losses. Subsequently, the Complainant alleged that the Respondent was in wilful non-compliance of the Board's decision. Explaining that North had found employment elsewhere, the Complainant proceeded only on its non-compliance complaint with respect to Gradon. By decision dated December 4, 1978, [1978] OLRB Rep. Dec. 1128, the Board found that the Respondent had failed to restore Gradon to his previous job as directed and at paragraph 19 of its decision observed:

"In the Board's view Gradon in presenting himself for employment on October 2nd, and in accepting the assignments given him between October 2nd and 18th, and in endeavouring to have his work assignments brought within the terms of the Board's Order, through discussions with his superiors, had acted with mature discretion and had done everything which could be reasonably expected of him to facilitate an implementation of the Board's Order. The Respondent employer, on the other hand, was embarked on a deliberate course of devising work assignments for Gradon such as would isolate him from contacts with other bargaining unit employees, and it is this course which is at the root of the failure to restore Gradon to his previous job."

8. By decision dated November 24, 1978, [1978] OLRB Rep. Nov. 1043, the Board certified the Complainant as the exclusive bargaining agent for a full-time bargaining unit excluding office, sales staff and part-time employees, inter alia, and reserved its decision with respect to a unit of part-time employees, pending the receipt of evidence under section 7a. This decision also reviewed evidence submitted by the Respondent in support of an allegation that membership support had been obtained by intimidation and coercion. The Board concluded that the charges were unfounded. The Board further concluded that it was not satisfied that a statement of desire filed in opposition to the certification application represented a voluntary expression of those employees who signed it and therefore declined to order a representation vote. It held that the Respondent had given its tacit support and approval to the circulation of the anti-union petition on company premises during working hours. Finally, in that same decision, the Board refused a request by the Respondent to inquire into the Form 8 charges filed by the Complainant holding that it had no allegation before it that if proven would support the impeachment of the declarations made in the Form 8.

9. The Respondent applied to the Court for judicial review of the Board's decisions dated November 24, 1978 and December 4, 1978.

10. The application for certification under section 7a for a bargaining unit of part-time employees was granted by the Board in its decision of March 29, 1979, [1979] OLRB Rep. March 248. Certification under section 7a of the Act is directed at those extraordinary situations where employer misconduct has, in the opinion of the Board, eliminated the reliability of any representation vote that might be held. In granting the union's application under this section, the Board relied on the earlier unfair labour practice dismissals; the failure of the Respondent to comply with the Board's order in respect of the employee Gradon; and the Respondent's conduct in relation to the circulation of the anti-union petition. It was also established that, in violation of the Act, a company foreman warned two bargaining unit employees that if the union gained a foothold the company would "move out west", thereby lending substance to rumours to this effect in the plant. The Board also took strong exception to the Respondent's written comment disparaging an examination conducted under the Act into

the duties and responsibilities of four employees whose inclusion [in] the bargaining unit the Respondent had challenged. The examination was conducted by a Labour Relations Officer at the direction of the Board as is the Board's practice. At paragraph 25 of its decision the Board wrote:

"There is no question that the company's statement was designed to give the employees a false impression of the Board's procedures and, more importantly for our purposes, to convey to the employees the employer's disrespect for these procedures. It is the Board's view that the statement, which borders on contempt, served to further erode the confidence which employees normally have in the processes established under the Act to guarantee freedom of choice and redress employer violations of the Act. The statement must be considered by the Board in conjunction with the continuing failure of this employer to comply with the Board's order in respect of the reinstatement of Mr. Gradon in deciding whether or not, in the context of this organizing campaign, the true wishes of the part-time employees would likely be ascertained in a secret ballot vote."

Finally, the Board took notice of the Respondent's conduct in distributing bright red "T" shirts embossed on the front with the words, "We're company finks" and on the back with "and proud of it". The Board viewed these actions as "a deliberate and unsophisticated attempt to polarize the workforce..."

11. The Respondent again applied to the Court to have this decision reviewed and this application together with the earlier application pertaining to the Board's "interim" certification of the full-time bargaining unit were dismissed by that Court in its decision of August 8, 1979 referred to above.

12. In accordance with our ruling that the Board would admit evidence relating to the Complainant's organizing campaign, Donald Gallagher was called as a witness by the Complainant. He is now employed by National Grocers, but was employed by the Respondent in the Barrie area as a security officer from March 1977 to September 1978. He and Roy Murden (who until recently occupied the position of Director of Personnel and Security) had known each other as colleagues in the City of Oakville Police Department...

71. Gallagher testified that through Roy Murden the Respondent hired certain persons to infiltrate and obtain information about the union. He testified that Murden hired a private investigation firm to take pictures of persons attending union meetings. He further testified that Murden told him he had been advised by "Fort Worth to get rid of the union no matter the cost." Neither Murden nor any other person employed in the management of either the Respondent or its parent corporation was called to rebut this testimony. Gallagher was cross-examined extensively with respect to the timing of the matters he attested to. While this cross-examination revealed some uncertainty over the issue of timing, we cannot find that the answers obtained from him on cross-examination were anywhere near sufficient to impeach the testimony or to render it so uncertain that this Board should not rely on it. We therefore find that the events to which he testified are factual. We further find that the hiring of the private investigation firm to perform the service it did and the hiring of persons Gallagher knew to be informants to infiltrate and obtain information about the union and its supporters amount to flagrant violations of sections 56, 58, and 61 of *The Labour Relations Act*. These actions, without rebuttal testimony, must be seen as going hand in hand with the termination of two employees and the threat of plant removal which the Board, in earlier proceedings, also found to be in violation of the Act. We have difficulty in imagining conduct that could be in greater conflict with an employer's obligations not to interfere with the selection of a trade union (section 56) and not to intimidate employees exercising their rights under the Act (section[s] 58 and 61). Even if the employees lacked the knowledge that they were being watched and reported on, we are of the opinion that surveillance activity can only have purposes of aiding an employer in "interfering" with the selection of a trade union and in "coercing" and "restraining" employees from engaging in protected activity and, with these purposes, constitute a *per se* violation of sections 56, 58, and 61 of *The Labour Relations Act*...

72. We further find that the overt taking of movie pictures or photographs of

employees on the picket line at the very commencement of the strike, in the context of this case had the coercive purpose of intimidating the employees engaged in protected strike and picketing activity against the Respondent....

75. In the facts at hand, the Respondent commenced bargaining after having dismissed two employees; threatened to move the company out west; given tacit support to an anti-union petition; refused to reinstate an employee at the direction of the Board; and disparaged the Board's normal certification procedures. It also engaged in the other flagrant unfair labour practices established in this case and commented on above. Notice to bargain was given in November of 1978 and meetings began in January. As bargaining commenced the Respondent was distributing T-shirts to its employees that another panel of this Board described as "further polarizing the workforce and further identifying itself as a combatant in the process." Against this background, we then find the Respondent sending a newsletter to all of its employees at the conclusion of each bargaining session and exchange of proposals. The Board has held that parties in first agreement situations ought not to bargain "in the dark" and that an employer is obligated to provide an employee bargaining agent on request with the details of all existing terms and conditions of employment of bargaining unit employees. See *De Vilbiss* [1976] OLRB Rep. Mar. 49. The failure to provide such information is a failure to make every reasonable effort to make a collective agreement and only perpetuates confusion and distrust at the bargaining table. The Complainant made a request of the Respondent for this kind of information and, while it was eventually provided, the newsletter to employees dated January 9, 1979 ridiculed and disparaged the request. The review of the union's first proposal in its newsletter of January 11, 1979 is in equally intemperate language. These communications, in this particular context, can only be considered as having the purpose of discrediting the Complainant in the eyes of the employees in order to undermine its position as their exclusive bargaining agent. While an employer is entitled to communicate directly with his employees notwithstanding the certification of a trade union, this right must be exercised judiciously and cannot be used to undermine the trade union's bargaining role. Nor, obviously, can it be used for subtle or not so subtle coercion and intimidation of employees. These communications, in our opinion, carried with them a veiled reminder of the Respondent's earlier coercive conduct and evidenced to them that the issuance of the certificate had had no impact on its anti-union attitude. We also find that the contents of these newsletters cannot be justified as attempts either to clarify employee misunderstandings or to persuade employees about the merits of a particular employer proposal....

We therefore find that the Respondent's direct communications with its employees violated sections 14, 56, 58, 59 and 61 of *The Labour Relations Act*.

76. We are also of the view that the content of the Respondent's first contract proposal was calculated to impair any progress in the negotiations by inserting the inflammatory relationship clause and the almost equally destructive open-ended proposal on employee conduct with its related penalties....

77. Bargaining over these inflammatory proposals then dragged on until the month of June 1979 with no discernible progress. Stopping at this point, we have no hesitation in concluding that the Respondent from November 1978 until June of 1979 utterly failed in its duty to bargain in good faith and make every reasonable effort to make a collective agreement. We are also of the view that its negotiating conduct during this period was a blatant continuation of its earlier anti-union animus and clearly aimed at further dividing its employees and undermining the trade union's statutory role in violation of sections 56, 58, and 61 of *The Labour Relations Act*....

89. After carefully analyzing all of the evidence, we have also come, on balance, to the more general conclusion that the Respondent was not bargaining in good faith and making every reasonable effort to enter into a collective agreement from June to August. This is not to deny that "progress" was made in negotiating the language of a possible agreement. But we think it more likely than not that the Respondent's rigid position on union security, as well as other items central to the negotiations, had the purpose of avoiding a collective agreement and was part and parcel of its earlier conduct aimed at undermining the trade union in the eyes of the employees in order to foster its early demise....

125. In the facts at hand, the Board is of the view that a broad range of remedies is required to attempt to redress the persistent and flagrant unfair labour practices of the Respondent. The Complainant has advised the Board that its supporters are almost totally demoralized and that many have quit the Respondent's employ. Its opinion in this respect is not inconsistent with the history of this collective bargaining relationship. Any remedy should have the purpose of redressing monetary losses and providing the Complainant with a reasonable opportunity to recapture the early momentum that sparked both certification applications.

(a)(i) The Board declares that the Respondent has failed to bargain in good faith and make every reasonable effort to make a collective agreement at all times relevant to this complaint.

(ii) The Board further declares that the Respondent's position on union security violates sections 14, 56, 58, and 61 of *The Labour Relations Act*.

(iii) The Board declares that the Respondent contravened sections 56, 58, and 61 of *The Labour Relations Act* in hiring persons to infiltrate the Complainant; in hiring a private investigation firm to survey meetings held by the Complainant; and in photographing employees on the picket line at the commencement of the strike.

(iv) The Board declares that various conversations of Jack MacDonald with employees on the picket line about possible decertification applications amounted to violations by the Respondent of sections 56, 58, and 61 of *The Labour Relations Act*.

(v) The Board declares that the Respondent's earlier direct communications with its employees by way of newsletters violated sections 14, 56, 58, 59, and 61 of *The Labour Relations Act* and that the recent publication thanking non-striking employees violated section 56.

(b)(i) The Board directs the respondent to bargain in good faith and make every reasonable effort to make a collective agreement. To this end, the Board specifically directs the respondent, on the receipt of this decision, to convene forthwith a series of bargaining meetings between itself and the complainant with the assistance of a Ministry of Labour mediator and, at the initial meeting, to make a complete proposal that the respondent is willing to accept as a collective agreement. In making this proposal the respondent is directed to cease and desist in its position on union security that we have found to be part of a continuing scheme to divide the loyalties of its employees; to undermine the exclusive bargaining agent status of the trade union; and to coerce employees into withdrawing support from the complainant or from commencing to support [the] complainant.

(ii) The respondent and its agent are directed to cease and desist from all other activities found by the Board to have been in violation of the Act and, more specifically:

- A. Engaging in surveillance of employees' activities in respect to union organization;
- B. Intimidating and coercing employees into withdrawing from the complainant union or from supporting the complainant union;
- C. Causing employees to act as informers in an effort to determine the extent of union activities of other employees in the bargaining unit;
- D. Communicating directly with employees with a view to undermining the exclusive bargaining agent status of [the] complainant union;
- E. In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist the United Steelworkers of America or any other labour organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted

activities for the purpose of collective bargaining, or to refrain from any or all such activities.

(c)(i) The respondent is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at its places of business where bargaining unit employees are employed in Barrie, Ontario, including all places where notices to employees are customarily posted and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been and is being complied with.

(ii) The respondent is directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative, to the residence of each employee in the said bargaining units forthwith. An employee who must scan the Board's notices hurriedly while at work under the scrutiny of others, will not be able to absorb the meaning and hence to understand his legal rights as one who reads them at home in a more relaxed fashion.

(iii) The respondent is further directed to publish, at its own expense, a copy of the notice marked "Appendix" duly signed by the respondent's representative, in the next issue of "Watts-Up" following the receipt of this decision, or the next subsequent issue thereto. The order is aimed at counteracting the widespread impact of the respondent's earlier improper statements made in this employee publication.

(iv) The Respondent is directed forthwith to convene during working hours a meeting of all bargaining unit employees in both bargaining units currently working on company premises and a representative of the Respondent is directed to read the attached notice marked "Appendix" to the employees. The Respondent is further directed to afford two representatives of the Complainant a reasonable opportunity to be present at the said meeting and to address the employees for no longer than thirty minutes immediately following the reading of notice by the Respondent's representative.

(v) The Respondent is directed forthwith to provide the complainant with a list of names and addresses of all the employees in both bargaining units and to keep this list updated for one year from the receipt of this decision. ...

(vi) The Respondent is directed to provide the Complainant for a period of one year from the receipt of this decision with reasonable access to all employee notice boards at the subject locations for the posting of union notices, bulletins and other union business literature in order that the employees may have free and ready access to information in the workplace from the Complainant concerning all aspects of collective representation and the collective bargaining negotiations.

(d)(i) The Board further directs the Respondent to pay all of the Complainant's negotiating costs incurred to the date of this decision and all extraordinary organizing costs arising out of the organizing of both the full and part-time bargaining units as damages caused by the improper actions of the respondent. ...

(ii) The Board further directs that the Respondent is obligated to pay to all bargaining unit employees all monetary losses that the Complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate heretofore a collective agreement due to the Respondent's earlier unlawful conduct, the said damage, if any, running up to the date of the first meeting convened by the Respondent in accordance with paragraph (b)(i) of the Board's order, together with interest as appropriate. The Registrar is directed to reschedule this matter for hearing and determination on the issue of damages on the application of the Complainant and the Board remains seized of this case for such purposes.

(e) Having regard to the history of unfair labour practices in this case, the Respondent is directed to give the Complainant reasonable notice should any supervisor or company agent

convene any group of bargaining unit employees and address them on the question of union representation within one year from the receipt of this decision. The respondent is further directed to afford two representatives of the Complainant a reasonable opportunity to be present at the speeches and upon request to permit one of them to address the employees for the same amount of time as the Respondent's address.

7. Following that decision, no further bargaining took place between the Company and the Union until the Divisional Court had dismissed an application for judicial review of the Board's decision and the Ontario Court of Appeal had refused to grant the Company leave to appeal. When bargaining resumed, the Company announced that it was discharging for strike-related misconduct Lisa Devoe, the Vice-President of the complainant, and Linda Lloyd, another member of the Union's negotiating committee. In the negotiations which followed that announcement, the parties agreed that those discharges would be referred to arbitration. With that difficult matter out of the way, the parties proceeded to enter into a one-year collective agreement. (In the ensuing arbitration proceedings, one of the discharged employees was reinstated with a one-month suspension and the other was reinstated with a two-week suspension.)

8. Mr. Potter joined the Company in September of 1979. Prior to that he held a variety of personnel and labour relations positions with various other employers, including Smith Transport, Fibreglass Canada, Duplate, Benson & Hedges, and Reynolds Extrusion. During that time, he acquired extensive collective bargaining experience, dealing with the Teamsters, U.A.W., the Steelworkers, and the United Tobacco Workers. Prior to September of 1979, the respondent's personnel functions were generally the responsibility of its security department. However, following the arrival of Mr. Potter, a personnel department was established to handle wage, salary, and benefit administration. That department was subsequently given responsibility for labour relations and employee relations, including recruiting.

9. During the term of the first collective agreement between the parties, there were many grievances and arbitrations. In an attempt to improve the situation, in the latter half of that contract year Mr. Potter invited to his office Donna Cadogan, the President of the complainant, and suggested that she speak with him whenever any problem arose among the employees, to see if the matter could be resolved promptly and fairly through "objective problem solving" without the necessity of grievance and arbitration proceedings. Mrs. Cadogan agreed to give this a try.

10. In their second round of negotiations, the parties held eight meetings and reached a settlement before the expiry of the first agreement. Although the Union applied for conciliation following the first meeting, a settlement was reached before a conciliation officer was appointed. During those negotiations, the Company agreed to delete the "long list of rules and penalties for infractions" that was contained in the first agreement, and also agreed to combine the part-time and full-time seniority lists. The application of "objective problem solving techniques", as suggested by Mr. Potter and agreed to by the respondent, resulted in a significantly improved relationship between the parties during the term of that (1981-83) collective agreement. In the first year the parties had only one grievance and no arbitrations. During the second year there were only three grievances and one arbitration.

11. The third set of negotiations between the parties involved a total of 17 meetings. The main issue in those negotiations was seniority as it applied to bumping rights on layoffs and temporary transfers. In what the Company viewed to be a major overhaul of seniority

rights, it agreed to permit bumping between departments, subject to a requirement of 60 days' experience in respect of certain positions. Although the Union representatives viewed those modifications as being considerably less dramatic, they agreed to incorporate them into a one-year collective agreement which was entered into prior to the expiry of the 1981-83 collective agreement, without resort to conciliation. Although the Company introduced a number of changes in the work place, there were no grievances during the first nine months of that collective agreement. However, several grievances were filed after the onset of bargaining in early 1984.

12. With regard to the relationship between the Union and the Company during the period from 1980 to 1984, Mr. Patterson testified that he "did not get the feeling from the Staff Representative that he [Mr. Berry] felt entirely comfortable with the relationship". He also testified that the relationship was "based on the fact that [the Union] had taken relatively short term collective agreements which were not 'Cadillac' agreements." However, it is clear from the evidence as a whole that following the very rocky start described above, the relationship between the parties gradually matured into a workable collective bargaining relationship which, although not wholeheartedly embraced by all members of management, the Company was prepared to live with, in accordance with its obligations under the *Labour Relations Act*.

13. The Union gave the Company written notice to bargain on December 21, 1983. Bargaining sessions were held on January 26, February, 13, 14, and 27, and, following the appointment of a conciliation officer, on April 4 and 5, 1984. The most prominent subjects of discussion at those meetings were seniority, bumping rights, temporary transfers, and grievance time limits. Each of the parties proposed some compromises but no progress was made since the Union remained firmly of the view that substantial changes were needed, while the Company remained steadfast in its view that no such changes were necessary or appropriate as, in its view, there had been a "complete overhaul" just twelve months earlier. Following receipt of a "no board" report dated April 16, 1984, the Union established 12:01 a.m. on May 3rd as a strike deadline. Mediation sessions were held on May 1 and 2 with the assistance of mediator Fraser Kean. Various compromises were proposed concerning the items in dispute but did not meet with acceptance. On the afternoon of May 2, the parties left those issues and turned their attention to monetary issues. They also agreed to extend the strike deadline to 12:01 a.m. on May 6. The Company's introductory economic offer was then presented to the Union through the mediator. When that offer did not generate a satisfactory response, the Company, after carefully considering its position, decided to put together its "settlement offer" (Exhibit #6) for presentation to the Union by the mediator. That offer was not acceptable to the Union. When further efforts by the mediator to effect a settlement did not meet with success, the Union representatives advised the Company through the mediator that they were going to hold a strike vote on May 5 on the Company's offer.

14. At a meeting held on May 5, Union representatives presented the Company's "settlement offer" to the membership and recommended that they reject it. A secret ballot vote was then conducted, in which voters were given the choice of either accepting the offer or going on strike. The majority voted in favour of striking. After that meeting Ms. Devoe telephoned Mr. Potter and advised him that a strike would commence on Monday morning (May 7) as the membership had turned down the Company offer and voted in favour of striking. After receiving that information, Mr. Potter sent the following telegram to Mrs. Cadogan and Mr. Berry:

This will acknowledge receipt of your notification to us that your members are taking strike action against the company commencing May 7th, 1984.

Please be advised the company recognizes the right of the union and its members to conduct a strike and to picket and to ask others to respect the picket line. However, the union and its members must respect the right of the company to carry on its business in every respect and they must provide free access to non-striking employees to go to and come from work unobstructed. Free access must also be provided for the delivery of goods and services.

Further, the company agrees to abide by the law during the dispute and it is expected that the union and its members will act lawfully also and conduct a peaceful strike. *Disciplinary action will be taken by the company against any employee engaging in misconduct during the strike.*

Pay cheques will be mailed to employees on the regular pay day unless they make other arrangements to pick them up. Further, insurance benefit premiums will not be paid by the company on behalf of striking employees beyond May 31st, 1984. Coverage for weekly indemnity benefits cease immediately. O.H.I.P. certificate of payment forms will be issued during June if the strike continues beyond May 31st.

[emphasis added]

15. As a result of its 1979 experiences with incidents on the picket line and mass picketing, the Company arranged to have a bright light installed at the entrance to its property on the night before the strike began. A line was also painted to demarcate the Company's property line. Arrangements were also made for additional security personnel and for cameras to photograph picket line activity. (The Union did not contend that any of those actions violated the *Labour Relations Act* in the circumstances of this case.)

16. On May 7, the Company implemented the (first year) increase of 4% (and the new mileage rates for truck drivers) contained in its "settlement offer". On May 11, Marvin L. Cash, the respondent's Vice-President and Managing Director, wrote as follows to each employee in the bargaining unit:

It is unfortunate that the Company and the Union were unable to reach a settlement on a new contract. The Company's offer brings the weighted average hourly rate to \$7.90 per hour in the first year, which we feel is appropriate for warehouse work in the Barrie area. The improved wage rates were put into effect on May 7th. A copy of the rate schedule is attached for your information.

The Company does recognize the Union's right to conduct a strike. However, the Union and our employees must also recognize the right of the Company to continue its business in all respects. You also have the right to work if you should wish to do so. Again, your legal right to take part in the work stoppage is recognized if that is your decision. However, in the event that you want to come to work, you are perfectly welcome to do so. You can arrange this by calling Radio Shack at 728-6242 and talk to your Supervisor.

As you are probably aware, no employee will be required to drive his or her own vehicle through the picket line as transportation is being provided by the Company.

17. On May 24, 1985, Ray Illing, the Director of the Ontario Conciliation and Mediation Service, convened an exploratory meeting at the request of Mr. Patterson, in an attempt to determine if it would be useful for the parties to return to the bargaining table. The Company was represented at that meeting by Mr. Potter, Larry Bertuzzi (its Canadian

counsel), Stewart Gordon (its U.S. counsel), and Mr. Van Ispen (its Controller). The Union was represented by Mr. Patterson, Mr. Berry, and Ms. Cadogan. At that meeting Mr. Patterson advised the Company that the Union had the support of the Canadian Labour Congress and the Ontario Federation of Labour. The parties then proceeded to discuss interplant job opportunities, with the Union representatives asserting that some members of the bargaining unit were being "dead-ended" while other employees with less seniority were getting better job opportunities, and the Company, through Mr. Potter, citing examples of employees who had progressed up through the ranks, and expressing the view that the changes represented by the Union were unnecessary. Although the Union representatives had prepared a "bottom line monetary position" for presentation to the Company, they decided not to table it because they did not feel that it would be a fruitful exercise in view of the fact that the parties were far from agreement on non-monetary items. The parties engaged in a candid discussion of their respective positions on the outstanding issues, but no progress was made at that meeting, which lasted approximately 45 minutes. Near the end of the meeting, Mr. Patterson said, "Perhaps the strike hasn't gone on long enough", to which the Company representatives replied, "You said it, not us." The meeting ended shortly after that exchange, when Mr. Patterson suggested that there was no point in continuing. It was not suggested by the Union that the Company was bargaining in bad faith at that meeting, or at any other time during the negotiations prior to October 25, 1984. Indeed, Mr. Patterson testified that the discussions were "very civil" and that they involved "two parties in a difficult situation trying to come to a resolve" concerning matters about which they had an honest difference of opinion.

18. Although almost all of the employees in the bargaining unit went on strike, the Company continued to operate during the strike and used rented mini-buses to transport across the picket line members of management, non-bargaining unit employees, temporary replacement workers, and bargaining unit employees who elected not to strike (or to return to work prior to the end of the strike). During the course of the strike, approximately ten of the strikers abandoned the strike and elected to return to work. However, the rest of the employees, including a number of employees who had refused to participate in the Union's "first agreement" strike, remained on strike until late in October.

19. In explaining why the Company decided to exercise its right to use replacement workers to carry on business during the strike, Mr. Potter testified that the Barrie facility was the Company's only warehouse and distribution centre in Canada, and that if it had not continued to operate, the Company would have been unable to deliver goods to its 800 retail outlets and might have been forced to layoff 1,800 sales people, as well as many non-bargaining unit employees at the Barrie facility. It is also reasonable to infer that the Company was seeking to maintain its profitability and its bargaining power. Although Mr. Potter testified that there were isolated cases where the boycott [by the union movement] had effect, he conceded in cross-examination that he was not aware of the Company's "ability to pay" being impaired by the strike.

20. Although officials of the Ministry of Labour were in touch with each of the parties from time to time as the strike continued, no further meetings between the parties occurred at any time between May 24 and October 25, 1984. It is also clear from the evidence that at no time during that period did the Company expressly renew its offer of May 2 following its rejection by the membership, or indicate to the Union whether or not that offer remained available for acceptance. However, it is an undisputed fact that Mr. Bertuzzi advised Mr. Kean on behalf of the Company that a settlement might involve "return to work issues".

21. Near the end of October of 1984, Mr. Berry and the other members of the Union's bargaining committee did some very serious "soul searching" in recognition of the fact that they were nearing the end of the six-month period during which the striking employees were entitled to apply for reinstatement under section 73 of the Act. Since Mr. Berry had come to the conclusion that the strike was lost, he turned his attention to getting the strikers back to work. In this regard, he was concerned that the Company might discharge the 26 employees who had been charged with various strike-related criminal offences during the course of the strike. He was also concerned that the Company might attempt to use its bargaining power to insist that those employees remain discharged as a condition of settlement. Having considered various options, Mr. Berry, after consulting with his immediate supervisor (Ed Hearst), decided about an hour before the October 25th meeting was to begin that he would "use [his] authority as a staff representative to ratify the contract" by accepting the Company's May 2 offer. It was Mr. Berry's view that if he adopted that course of action, any discharged employees would have access to the grievance procedure.

22. After the Company was advised by the Ministry of Labour that a meeting of the parties had been called for October 25, 1984, the Company's bargaining committee met in caucus on October 24 to decide upon the position which they would take on the following day. Since they anticipated that a settlement would soon be reached, they considered what their position would be with respect to various changes which had been implemented during the strike, and with respect to "return to work" issues. They also discussed the outstanding contract issues and developed a revised proposal. Company officials also reviewed all of the "employee misconduct" which had occurred during the strike and decided to discharge five employees, and to suspend two other employees for four weeks. None of the discharged employees was a member of the Union's bargaining committee although one of them, Catherine Ritchie, was the Union's financial secretary. Mr. Potter was unaware that Ms. Ritchie held a position with the Union, but he was aware that one of the two suspended employees was a Union steward. In explaining why the Company took disciplinary action at that time rather than earlier in the strike, Mr. Potter testified: "It hasn't been my style, or the Company's, to discharge people during a strike. [To do so] heats up the dispute. No one wants that. We hadn't had mass picketing. We didn't want to generate any more heat than was already there." He also testified that he took into account the Board's decision in the *Becker Milk Company Ltd.* [1977] OLRB Rep. Dec. 797, and that the prime reason for discharging the employees prior to the meeting on October 25 was to make the discharge inarbitrable, as the Company felt very strongly about their misconduct and "wanted to do everything legal that [it] could to keep them discharged." He also candidly conceded in cross-examination that he realized that after a six-month strike the discharge of five employees would be a very difficult issue for the Union, that those discharges might render the achievement of a collective agreement very difficult for the Union, and that the Union might be faced with a choice of agreeing to the five discharges or continuing the strike beyond six months and thereby jeopardizing the return to work of the remaining strikers. Mr. Potter testified that the Company was "hard bargaining" and that it "was in a strong negotiating position" and "intended to have those five employees no longer employees." He also told the Board that he expected that the Union would raise the discharges and suspensions in bargaining and that "if it came to bargaining, [the Company] would take the position that they remain fired, not as a bargaining tool, but as one of the parts of the return to work agreement". He further testified that the Company could have been influenced by discussion if there had been an opportunity to discuss the matter during the negotiations which the Company expected to occur concerning return to work issues.

(We make no finding at this stage of the proceedings as to whether or not any of the employees in question engaged in strike-related misconduct and, if so, whether that was the sole reason for the discharges and suspensions. That issue remains to be decided at a later date in the event the parties are unable to resolve that matter themselves. In this regard, we note that at the time he asked the Board to sever this aspect of the complaint and decide it in advance of the balance of the complaint, Union counsel acknowledged that for purposes of this phase of the complaint, the Board must treat the discharges and suspensions as not involving any illegality, although he expressly reserved the right to argue that the timing of the discharges and suspensions should lead the Board to conclude that the Company was attempting to avoid entering into a collective agreement contrary to section 15 of the Act.)

23. As a result of their discussions on October 24, it was the Company representatives' plan for the October 25 meeting to first inform the Union of the various operational changes which had been made during the course of the strike, and then to "negotiate the return to work and outstanding contract issues". Those operating changes included the contracting out of certain computer repair work and of certain "truck runs in Quebec and the West", the establishment of the entire warehouse as a "no smoking" zone, the banning of the use of private radios in the warehouse, the establishment of a new (non-bargaining unit) job in the parts department, the establishment of a second shift, and the Company's decision to open a new distribution centre in Western Canada (as an expansion, rather than a replacement, of the Barrie operation to which this complaint pertains). Although the Company did not intend to negotiate with the Union concerning those changes (which had already been implemented and which the Company planned to continue in effect after the strike), they considered it to be part of their bargaining obligation to inform the Union of those changes. The Company also planned to advise the Union of the five discharges and the two suspensions, which were imposed on October 25 between 11:30 a.m. and 12:30 p.m. by means of telegrams sent by Mr. Potter to the seven employees affected.

24. The October 25 meeting was scheduled to begin at 1:00 p.m. at a Ministry of Labour meeting room in Toronto. However, the commencement of that meeting was delayed for approximately half an hour at the request of Mr. Berry. When Mr. Kean entered the meeting room at 1:30 p.m., he announced that the Union had a document which it wanted to present to the Company and which he had not read. Mr. Berry then immediately handed the Company representatives four copies of the following letter (Exhibit #10):

DELIVERED BY HAND United Steelworkers
of America,
25 Cecil Street,
TORONTO, Ontario
25 October, 1984

Radio Shack Division
Tandy Electronics,
Bayview Drive,
BARRIE, Ontario.

Dear Sir:

Re: Labour Dispute

By this letter the union accepts the outstanding offer of the company made in writing on May 2nd, 1984, in all respects.

We therefore take the position that there is a collective agreement in place from the moment of delivery of this letter to you.

The union is prepared to sign a formal collective agreement incorporating the amendments agreed to as soon as one has been prepared.

This will further advise you that all persons presently on strike are prepared to return to work pursuant to this settlement and Section 73 of the Labour Relations Act.

Yours truly,

UNITED STEELWORKERS OF
AMERICA and its LOCAL
9011

(signed) Frank Berry

When Mr. Berry presented that letter to the Company, he was unaware of the aforementioned discharges and suspensions.

25. The Company representatives then requested and were given an opportunity to caucus in order to consider their position. Mr. Potter's evidence concerning his reaction to that letter was: "I was quite shocked. I had been in labour relations and contract negotiations for 30 years. I've never seen anything like this before. I reacted that there was no meeting, no opportunity to talk about issues. I was puzzled, particularly over the Union saying that there is a contract and yet employees propose to come back to work under section 73, which occurs when there is no contract."

26. After caucusing for about ten minutes to consider their position, the Company representatives met again with the Union representatives and informed them that they did not agree with the Union's position and that, in their view, there was no contract. They then asked the Union representatives if there was any point in trying to negotiate the term of the collective

agreement and return to work matters, to which Mr. Berry replied in the negative. In the ensuing discussion, Mr. Berry remained firm in his view that there was nothing to negotiate because the parties had a collective agreement since the Union had accepted the Company's offer of May 2. However, he also told the Company representatives that the Union was prepared to listen to anything the Company had to say. Following repeated statements by the Union that there was a collective agreement and repeated statements by the Company that there was no collective agreement, the Company proceeded to advise the Union of the aforementioned operational changes and of the five discharges and two suspensions. The Company also assured the Union that none of those operational changes would result in any layoffs since the affected employees would be absorbed into other (bargaining unit) jobs. After receiving this information, Mr. Berry stated that as far as the operational changes were concerned, the Company could probably do all of that under the collective agreement anyway, but that as far as the discharges and suspensions were concerned, the Company was "half an hour too late". When Mr. Berry indicated that the Union would be grieving the suspensions and discharges, the Company asserted that they had taken place earlier that day and that they were not grievable. Mr. Berry replied that the Union was going to grieve them anyway. When the Company asked Mr. Berry if it was the Union's position that the striking employees would be returning to work under section 73, Mr. Berry replied, "Yes, everyone will be in to work on October 29." The meeting closed with the Company stating that it would accept all of the employees back to work under section 73, except the five employees who had been discharged.

27. It was Mr. Berry's evidence that he was not surprised by the discharges. Indeed, he testified that he was "surprised that there weren't more fired". He readily conceded that he was "trying to outmaneuver the discharge of people". However, he adamantly resisted Company counsel's suggestion that his actions were "sneaky", and asserted that the Union gave up its right to further negotiate in order to "ensure that the Company couldn't discharge employees without recourse to the grievance procedure and use it to scuttle the negotiations".

28. Mr. Potter testified that the matters which in his view had to be negotiated in order to arrive at a settlement included the term of the collective agreement, return to work matters, and resumption of benefits. He also testified that "depending on the term, the offer could have been different in terms of dollars". With respect to the term of the agreement, Mr. Potter noted that the Company had proposed a three-year collective agreement that, under the terms of its May 2 offer, was to expire on March 12, 1987. Under the terms of that offer, there was to be a 4% increase effective as of the date of ratification, a 3% increase effective March 13, 1985, and a further 3% increase effective March 13, 1986. In this regard, it was Mr. Potter's uncontradicted evidence that "it is not new to the United Steelworkers for an adjustment [to be made] to the agreement dates where there's been a strike; it's common at Inco and other employers they represent." With respect to return to work issues, Mr. Potter testified that the Company viewed those issues as being an integral part of a settlement, and suggested that the matters to be negotiated included "who comes in first, when, and to what jobs". In this regard, he noted that in view of the displacement of some of the employees such as the truck drivers whose work had been contracted out, there would be some bumping rights to be exercised. He also noted that the Company had approximately 140 employees working in the bargaining unit at that time, 91 of whom were to be displaced by the returning strikers. (The Company's work force had increased during the strike as a result of normal seasonal fluctuations in bargaining unit work.)

29. Counsel for the Union contended that the Company's October 25 repudiation of its

offer of May 2, and its interjection of the aforementioned discharges, constituted bad faith bargaining prohibited by section 15 of the Act. He conceded that a party cannot necessarily expect that an offer that has been made and rejected will remain available for acceptance in all circumstances without being formally withdrawn. However, he submitted that that principle must be applied with caution to assure that it cannot be used to cover conduct which is unlawfully motivated. In this regard, he urged the Board to find that the timing of the discharges was designed to make it virtually impossible for the Union to enter into a collective agreement, by presenting the Union with a "Hobson's choice, tailor-made for rejection", between accepting the inarbitrable discharge of five members of the bargaining unit or continuing the strike beyond the six-month period contemplated by section 73, thereby jeopardizing the return to work of the remaining strikers. He further submitted that the Company's decision to effect the five discharges at that time crossed over the boundary of hard bargaining and amounted to unlawful interference with the Union's right to represent them. Thus, he submitted that the Company contravened not only section 15 of the Act, but also sections 64 and 66. It was also his contention that the Company had failed to provide to the Union, and to the Board, an adequate explanation of why the May 2 offer was no longer available for acceptance by the Union on October 25. The relief sought by the Union includes a declaration, a cease and desist order, and a direction that the parties execute a collective agreement embodying the terms of the Company's offer of May 2.

30. In his submissions to the Board, Company counsel contended that his client had not contravened the Act in any way. It was his position that no collective agreement was reached on October 25 because at that time there was no Company offer capable of acceptance by the Union, the Company's offer of May 2 having been rejected not only by the Union bargaining committee, but also by the Union membership in May of 1984. He further argued that the Company was under no obligation to provide the Union, or the Board, with an explanation of why the Company's May 2 offer was no longer available for acceptance by the Union on October 25. However, he also submitted, in the alternative, that the Company had provided an adequate explanation by referring to the need to negotiate about "return to work matters" and the term of the collective agreement. In this regard, he contended that it was self-evident that a number of matters would have to be negotiated, such as the expiry date of the collective agreement, adjustment of benefits, and the timing of the return to work of the strikers who had been temporarily replaced by other workers during the strike. In support of that submission he noted that what the Company was offering on May 2 was wage increases totalling 10%, in the context of a collective agreement that would run for approximately 34-1/2 months. He further noted that in the absence of a revision of the proposed expiry date of the agreement, the Company would obtain only 28-1/2 months of "labour peace" in return for the 10% increase, rather than the 34-1/2 months contemplated at the time the offer was made. Company counsel also submitted that it would be unreasonable to expect his client to disclose all of the bargaining possibilities in the face of a refusal by the Union to engage in any further bargaining. It was also his contention that insofar as the Union's bargaining complaint was based on the five discharges, it was entirely premature in that the Union had not yet even attempted to bargain about those discharges, much less reached a point in bargaining at which it could legitimately claim that the Company's position with respect to those discharges was tailor-made for rejection.

31. As reflected by a number of the cases to which counsel referred the Board in their able submissions, this is not the first case in which the Board has been called upon to resolve issues of the type raised in these proceedings. It is well established in the Board's jurisprudence

that a party which possesses superior bargaining power is legally entitled to engage in "hard bargaining" with a view to obtaining a collective agreement that contains terms favourable to its economic and other legitimate interests. See, for example, *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65, at paragraph 14, in which the Board wrote:

... [section 15] of The Labour Relations Act is not intended to redress any imbalance of bargaining power that may exist between the parties. A party whose bargaining strength allows it to force the acceptance of hard terms at the bargaining table does not thereby bargain in bad faith. The very word "bargain" presupposes that the parties will seek to maximize their own best interests. Hard bargaining, albeit ruthless, is not bad faith bargaining.

See also *CCH Canadian Limited*, [1974] OLRB Rep. June 375; *Radio Shack*, [1979] OLRB Rep. Dec. 1220; and *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356, in which the Board wrote, in part, as follows (at pages 1363-4):

30.In recent years the Board has been scrupulous to protect the framework of collective bargaining: the independence of the union, the integrity of its role as the employees' exclusive bargaining agent, and the right to information necessary for it to properly perform its statutory role. But the Board has been equally clear that it will not act as interest arbitrator, or prescribe the precise contents of the parties' collective agreement - even in the face of an "egregious" breach of the duty to bargain in good faith (see *Radio Shack*, *supra*). The content of the agreement is for the parties to determine, in accordance with their own perceived needs and relative bargaining strengths. The legislation enables employees to combine together to bargain collectively and compels the employer to recognize their bargaining agent. It further provides a framework within which there can be an exploration of the parties' differences and a sincere effort to reach some accommodation. Despite the adversarial aspects of collective bargaining, there are substantial areas of mutual interest between employers and employees which informed discussion may reveal. But the statute does not *require* any particular concessions, nor does it stipulate the content of a collective agreement, or even that a collective agreement always must be the necessary outcome of the parties' bargaining.

31. One cannot quarrel with the proposition that the "duty to bargain in good faith" must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision-making as the normative standard for the collective bargaining process. Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development from given and accepted premises. It is a process in which reason plays a part - but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a "claim of right" from a "naked demand". Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a "fair" settlement, or a just allocation of rewards to capital and labour.

32. One of the issues on which "hard bargaining" may occur is the arbitrability of discharges and suspensions imposed during a strike for picket-line misconduct. The Act does not impose any legal obligation to arbitrate disciplinary action imposed during a strike. However, it is open to a union to attempt to use its bargaining power to obtain a recision of

such disciplinary action or an agreement to refer it to arbitration. Similarly, it is open to an employer to attempt to use its bargaining power to resist reinstatement or arbitration, provided such resistance is not motivated by anti-union animus or a desire to avoid entering into a collective agreement. See *John T. Hepburn, Limited*, [1985] OLRB Rep. Jan. 75, at paragraphs 12 and 16. See also *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, in which the Board, after finding that three strike-related discharges were not motivated by anti-union animus, wrote as follows (in paragraph 37):

It is important to point out in light of the earlier discussion of principle, that even a non-motive section 64 analysis of these three discharges and refusal to arbitrate would not produce a different result to this point. We have found that, given the circumstances, the decision to discharge was not clearly excessive and by itself a hallmark of anti-union animus. The decision not to arbitrate merited no different characterization. Were we to intervene on the basis of section 64, the Board would be saying that all discipline issued during a strike must be submitted to arbitration because any potential excessiveness could deter participation in protected activity. This extreme sensitivity to protected activity might well be seen as insufficiently sensitive to improper picket-line misconduct and would not obligate trade unions to take all such issues to arbitration instead of placing them on the bargaining table. It would also be difficult to reconcile our sensitivity to any adverse impact on protected activity with the absence of a legal obligation to arbitrate arising under the Act. A clear imbalance in favour of protected activity does not exist. In this type of situation it seems to us that a non-motive approach to section 64 should be reserved for instances of clear mistake or for discipline clearly out of all proportion to the misconduct in issue.

33. A party may alter or revise its position at the bargaining table in response to changed circumstances, such as a diminished "ability to pay". However, an alteration of position will contravene section 15 of the Act if it is designed to avoid entering into a collective agreement. The following passage from *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136, is instructive in that regard:

7. We start with the long held view of this Board that "the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment." (See the *De Vilbiss (Canada) Ltd.* case, [1976] OLRB Rep. March 49 at para. 13.) This Board recognizes the concept of voluntarism as relied upon by the respondent company. As a general proposition a party is free to take whatever position best satisfies its self interest providing it maintains the intention of concluding a collective agreement. The difficult cases arise where a party tables a position which it maintains is legitimately in its self interest but which the other side maintains is destructive of the process or designed to avoid a collective agreement and to undermine the trade union. In the *Pine Ridge District Health Unit* case, [1977] OLRB Rep. Feb. 65, the Board noted:

"Collective bargaining does not take place in a vacuum, or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining..."

(See also *Toronto Jewellery Manufacturers' Association* [1979] OLRB Rep. July 719).

However, the Board's views as expressed in the *Pine Ridge District Health Unit* case, *supra*, cannot be taken as a carte blanche to alter one's bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making

framework necessary for collective bargaining would be contrary to section 14 [now section 15] of the Act. (See the *Graphic Centre (Ontario) Inc.* case, [1976] OLRB Rep. May 221.) Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to changes in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

In that case, which involved negotiations for a first agreement, the company waited until five and a half months after the commencement of the strike, and five and a half months after it had put into effect the rates contained in its last offer, to announce that the owner of the company was only prepared to negotiate a collective agreement if the union would reimburse it for the \$100,000 or more lost during the strike, or accept a 50 per hour reduction in rates of pay. In finding the company to be in violation of what is now section 15 of the Act, the Board wrote:

10. A natural suspicion attaches to the motives of an employer who alters his bargaining position at a critical stage in negotiations; this is especially so where the negotiations are for a first agreement. When as in this case, the employer does not simply table a revised position based on his projected ability to pay, but requires the trade union to agree to a calculation of the company's losses during the strike and the subtraction of these losses from the company's last offer, the concern increases. When the employer who is revising his position in this manner has paid those working during and after a strike on the basis of his last pre-strike offer and has not unilaterally cut these rates in response to changing economic conditions as he is entitled to do, the Board must draw the inference that the employer no longer has the intention of entering into a collective agreement. The decision of the company to continue to pay at the level of its past pre-strike offer throughout the period, coupled with the tabling of a position which requires the union to agree to a calculation of its losses during the strike, and makes the signing of a collective agreement conditional on a reduction in wages equal to the company's losses, creates a Hobson's choice for the trade union. The union is put in the position of having to agree to the company's proposal, thereby identifying itself as the cause of a reduction in the employees' wages based on the cost to the company associated with a legitimate exercise of the right to strike (in effect the imposition of a penalty on employees for having exercised the right to strike), or of abandoning the employees who have chosen the union to represent them collectively. In the circumstances, the proposal must be characterized as having been designed for rejection. Even if the trade union was prepared to accept such a proposal, which is doubtful to say the least, the employees whose wages would be reduced to make the company whole for the losses incurred by it during the strike, would most certainly reject it. On the facts we can come to no other conclusion but that the company's bargaining strategy was designed with this result in mind.

Similarly in *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397, the Board found a contravention of section 15 of the Act where an employer, whose "position on union security was primarily aimed at avoiding a collective agreement", withdrew its outstanding monetary proposals in order to continue that avoidance in the face of legislation (Bill 89, which amended the Act to include what is now section 43) that effectively eliminated union security as a matter of impasse between the parties. (See also *Shaw Almex Industries Limited*, [1984] OLRB Rep. Apr. 659.)

34. Of particular relevance to the instant complaint is the Board's decision in *The Toronto Jewellery Manufacturers' Association*, [1979] OLRB Rep. July 719. In that case the Association made a proposal to the union on January 30, 1979, which was rejected by the union by means of a counter-proposal. The Association renewed its offer in a letter dated

February 12, 1979. After attempting unsuccessfully to obtain a further offer from the Association, the union embarked upon a strike. Approximately three weeks after the commencement of the strike, the union purported to accept that offer through a ratification vote. In dismissing the union's complaint alleging that the Association had contravened what is now section 15 of the Act, the Board wrote, in part, as follows:

7. It is clear from the facts in this case that the complainant, having been unable to use whatever bargaining power it possessed at the time to obtain a satisfactory proposal from the Association for settlement of negotiations, took the ultimate recourse of resorting to the economic sanction of a strike in an attempt to obtain bargaining objectives which it must have seen to be in its best interest. This action was taken some two months after the Association made its last offer. Albeit, the action was not taken until one last effort was made to gain a further offer from the Association. A little more than three weeks after it began the action, the complainant sought and obtained from its members acceptance of the Association's last offer. The question is, within the collective bargaining context, was the offer still there for the complainant to accept.

8. Collective bargaining is a dynamic process and it is also one to which the parties apply their relative bargaining strengths in an attempt to gain from each other concessions and compromises which eventually produce a collective agreement. There is an implied expectation in the give and take of collective bargaining that concession and compromise will result in agreement without the exercise of economic sanction. In fact, it is not uncommon for either party to make this an explicit condition attached to tentative agreement on any or all items so that, if there is either a lockout or strike, all issues are "back on the table". There is no evidence in our case that such a condition was attached to the Association's last offer and the evidence is that it did not subsequently withdraw its offer. The Board, therefore, must consider what effect, if any, the passage of time and the intervening events have had on the status of the offer.

9. In *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65, the Board commented as follows about the collective bargaining process:

"Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining and in our view, is applicable in the instant case."

The Board found, in all the circumstances of that case, that the conduct of the employer following a lockout of withdrawing from tentative agreement on one of the major issues between the parties was not a breach of the section 14 obligation. The Board concluded that the employer's action might be tough bargaining but was not a violation of the Act. In so doing, the Board was recognizing that one of the realities of the bargaining process is that intervening events may be legitimate cause for the parties to alter their positions.

10. The question in the instant case is whether, absent a formal withdrawal of the Association's last offer, the passage of time and the intervening event of the strike have extinguished the last offer. The complainant rejected it in the first instance by making a counter-proposal. Whatever the Association's reasons were for writing its letter of February 12th setting out the offer in writing, it is reasonable to conclude that the offer was still open at the time. The complainant, after determining that no further proposal was forthcoming, then resorted to the ultimate form of rejection by embarking on a strike. Is it entitled to expect, after being on strike for up to three weeks, that the offer is still there for the taking? It would seem from

the Association's silence that it thinks not, however, that is a matter for the Board to determine. Having regard to the Board's comments in *Pine Ridge, supra*, about the collective bargaining process, it would be naive in the extreme for parties to collective bargaining to expect that conditions which prevailed before a strike or lockout to still prevail afterward. That is not to say that both parties might not see it to be in their best interests to agree to pick up bargaining where they left off before a strike or lockout; rather it is to say that neither party is entitled to rely on that being the situation. The Board's jurisprudence on section 14 complaints recognizes this reality when it is dealing with the refusal of one party to resume bargaining during or following a strike or lockout. One of the factors the Board takes into account is whether the party requesting that bargaining be resumed has indicated that it is prepared to make significant concessions from its position prior to the onset of economic sanction. In the absence of such an indication, the Board usually will not find a refusal to resume bargaining to be a section 14 violation. The evidence in this case establishes that the complainant, by going on strike, has taken its best shot at the Association to try and get an improved settlement offer. It has failed and is now trying to salvage the terms which were available before the strike.

11. Having regard for all of the foregoing, the Board finds that the last offer has been extinguished by the passage of time and the intervening event of the strike between February 12, 1979, when the Association issued the letter containing its last offer and May 2, 1979, when the complainant first attempted to advise the Association that the complainant's members had accepted the offer....

35. For similar reasons, we are satisfied that the Company's offer of May 2, 1984 had been extinguished by the passage of time and by the intervening event of the strike long before its purported acceptance by the Union on October 25. As indicated above, the membership specifically rejected that offer on May 5 and voted in favour of striking. The strike commenced on May 7 and continued for over five and a half months until late October when the employees elected to exercise their right to reinstatement in their former employment under section 73 of the Act. Under the circumstances, Mr. Berry's attempt to salvage the terms that were available to the Union prior to the onset of the strike by accepting the Company's offer of May 2 did not result in a collective agreement as there was at that time no outstanding Company offer capable of acceptance.

36. We are also satisfied in the circumstances of this case that the Company's unwillingness to enter into a collective agreement embodying the terms of its May 2 offer without any changes did not constitute a contravention of section 15 (or any other provision) of the Act. Since almost six months had elapsed from the time that offer was made, during which period the Company had hired over one hundred temporary replacement workers in order to carry on its business, it is hardly surprising that the Company would desire to bargain with the Union concerning such matters as the term of the collective agreement and "return to work" issues, particularly in view of the fact that the balance of bargaining power had shifted from the Union, which had lost the strike, to the Company. That the Company's representatives did not provide a more detailed explanation of the matters about which they wished to bargain on October 25 is also not at all surprising in view of Mr. Berry's repeated assertions that there was nothing to bargain about because the parties already had a collective agreement.

37. Much of the argument presented on behalf of the Union in the present case was directed toward the timing of the five discharges and two suspensions (which, as indicated above, are to form the subject matter of the second phase of this complaint and must be presumed to be lawful for the purposes of this decision). As indicated above, Union counsel contended that by discharging those individuals at that time, the Company intended to avoid

entering into a collective agreement by presenting the Union with the unsavoury choice between accepting the inarbitrable discharge of five members of the bargaining unit or continuing the strike beyond the six-month period contemplated by section 73, thereby jeopardizing the return to work of the remaining strikers. However, the evidence adduced before the Board, considered as a whole, does not support that characterization of the Company's conduct. At the onset of the strike, Mr. Potter advised Mr. Berry and Mrs. Cadogan (by telegram) that disciplinary action would be taken by the Company against employees who engaged in misconduct during the strike. Moreover, Mr. Potter provided the Board with a credible explanation concerning the timing of the discharges and suspensions. As indicated above, he testified that it is not his or the Company's style to discharge employees during a strike because to do so "heats up the dispute". That this was indeed the Company's practice is evidenced by the fact that the Company discharged two employees near the conclusion of the 1979 strike. It is not difficult to understand why an employer which had encountered mass picketing in an earlier strike would be reluctant to further "heat up" a situation already fraught with tension, particularly where, as in the present case, it was continuing to operate its business during the strike. Moreover, the Company's action did not come as a surprise to Mr. Berry, who was expecting the Company to discharge a greater number of employees and was hoping to make such discharges arbitrable by entering into a collective agreement before they were put into effect. Having regard to all of the evidence, we are satisfied that the discharges and suspensions were effectuated by the Company on October 25, 1984 in a lawful attempt to make them inarbitrable under the collective agreement which it anticipated would be entered into later that day or shortly thereafter, and not in an unlawful attempt to avoid entering into a collective agreement.

38. In concluding that this phase of the complaint must be dismissed, we have not overlooked Union counsel's contention that the Board must carefully scrutinize the actions of the respondent, which Union counsel described as having been "one of the most notorious labour law violators in the Province". However, the egregious unfair labour practices described above were all committed over five years ago. The evidence adduced before us indicates that during the ensuing period, the parties have developed a viable collective bargaining relationship which has yielded three collective agreements, the two most recent of which were negotiated without even the intervention of a conciliation officer. There is no evidence that the Company has committed any unfair labour practices during the period covered by those collective agreements or during the bargaining which preceded the October 25, 1984 meeting. While we do not doubt that the Company, like many other employers, would prefer to operate without a union if it were in a position to legally do so, the evidence as a whole indicates that the Company is (and has for the past several years been) complying with its legal obligations under the *Labour Relations Act* in respect of collective bargaining with the Union.

39. For the foregoing reasons, the portion of the complaint to which this decision pertains is hereby dismissed.

40. The Registrar is directed to list the balance of this complaint for continuation of hearing, in consultation with the representatives of the parties.

DECISION OF BOARD MEMBER L. COLLINS;

1. I dissent.

2. I am of the view, on the basis of all the evidence, that the discharges and

suspensions were announced by the respondent on October 25, 1984, in order to avoid entering into a collective agreement. Thus, I would find the respondent to be in contravention of sections 15, 64 and 66 of the Act, and would grant the relief sought by the Union.

1415-84-U; 1691-84-R; 1692-84-R Canadian Union of Public Employees, Complainant, v. **The Corporation of the City of Stratford**, Respondent; Canadian Union of Public Employees, Local 197, Applicant, v. The Corporation of the City of Stratford and K. & E. Solid Waste Management, a Division of W. Kuindersma & J. Esser Limited, Respondents; Canadian Union of Public Employees, Local 197, Applicant, v. The Corporation of the City of Stratford and K. & E. Solid Waste Management, a Division of W. Kuindersma & J. Esser Limited, Respondent

Employer - Related Employer - Sale of a Business - City contracting out garbage collection to established contractor - Whether city actual employer of contractor's employees - Not transfer of part of City's business - City relinquishing functional control over employees performing work - Mere commercial control not amounting to "real economic power" - City and contractor not related employers

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *W. H. Wightman* and *H. Kobryn*.

APPEARANCES: *James K. McDonald, Mike Dunn, Duncan Haslam* and *Jim Myers* for the complainant/applicant; *R. C. Filion, Q.C.* and *J.M. Skinner, Q.C.* for The Corporation of the City of Stratford; *R. J. McComb* and *J. Esser* for K. & E. Solid Waste Management, a Division of W. Kuindersma & J. Esser Limited.

DECISION OF THE BOARD; June 28, 1985

1. The Canadian Union of Public Employees, Local 197, hereinafter referred to as the Union, filed a complaint under section 89 of the *Labour Relations Act* alleging that the respondent, the Corporation of the City of Stratford, hereinafter referred to as the City, violated various sections of the *Labour Relations Act* by its conduct in arranging to have the majority of its garbage collection that the City's employees represented by the Union had been doing performed by someone else. After the Union had filed its unfair labour practice complaint, (Board File No. 1415-84-U), it filed an application for a declaration that the City and the respondent K. & E. Solid Waste Management, a Division of W. Kuindersma and J. Esser Limited, hereinafter referred to as K. & E., are one employer for purposes of the *Labour Relations Act*, pursuant to section 1(4) of the Act (Board File No. 1691-84-R) and an application under section 63 of the Act alleging that there was a sale of business from the City to K. & E. (Board File No. 1692-84-R). The Union's applications under section 1(4) and 63

of the Act were filed with the Board at about the time the City and K. & E. entered into a contract under which K. & E. would perform almost all of the garbage collection work that had been done previously by the City.

2. At the opening of the hearing of these matters, the parties agreed that the Board should deal first with the Union's applications under section 1(4) and 63 of the Act and its allegation that the City is the actual employer of the persons who are, at least, the nominal employees of K. & E., and defer consideration of the Union's complaint under section 89 of the Act until the Board disposed of those proceedings. The parties further agreed that any evidence that the Board received in these proceedings that may be relevant to the union's complaint under section 89 would be applied by the Board in the section 89 proceeding, subject to the agreement of the parties, and that either party in the section 89 proceeding shall have the right to have any witness adducing evidence in these proceedings which is also relevant to the section 89 proceeding recalled for purposes of cross-examination if that witness is not called to give evidence in examination-in-chief in the section 89 proceeding.

3. The City is a municipal corporation with approximately 26,500 residents. It carries on the business of a municipal corporation providing a wide variety of municipal services to its residents, as permitted or required by the *Municipal Act*, R.S.O. 1980, c. 302 and various other statutes. One of the services provided by the City to its residents is garbage and refuse collection.

4. The City's operating budget, exclusive of capital expenditures, for 1984 was approximately \$17,200,000, of which approximately \$270,000 was allocated for garbage and refuse collection. The City employs approximately 240 persons, with 42 employees covered by a collective agreement between the City and the Union. (The City also has a collective agreement with a sister local of the Union covering 64 employees. There are employees in the City's fire department, police department, library and administration who are not bound by collective agreements with the Union or any other of its sister locals.)

5. The collective agreement between the City and the Union applies to certain employees of the City's public works, traffic maintenance, and animal control departments and to employees at the City's cemetery and board of park management. Garbage collection for the City is the responsibility of the public works department under the authority of the City Engineer who is ultimately responsible to the City's council through the public works sub-committee of the council.

6. K. & E. has been in the solid non-hazardous waste disposal business since 1978 and has been engaged by several municipalities in Ontario to do garbage collection since that time. The vehicles it owns are valued at over one million dollars and it employs approximately 60 people.

7. In August 1984, the City decided to invite bids for its garbage collection work. K. & E. became aware of the City's review of its garbage collection operation and of the possibility that it might invite bids for that work in May of 1984, when John Esser, the President of K. & E., received a telephone call from Ronald Phillips, the City Engineer of the City, inquiring about the contracts for garbage collection that K. & E. had with other municipalities. Mr. Esser sent Mr. Phillips copies of those contracts at the request of Mr. Phillips. Mr. Esser later spoke with Mr. Phillips and attempted to arrange a garbage collection contract.

Mr. Phillips advised Mr. Esser that any such contract had to be tendered and in any event he was not sure at that time whether City council would be tendering its garbage collection. K. & E. subsequently found out about the tender when a newspaper advertisement for the tender came to Mr. Esser's attention. Mr. Esser went to Stratford to pick up the tender documents, and together with two of his employees, spent some time in Stratford following some of the City's garbage trucks, driving through the City and discussing among themselves the labour and equipment that would be needed to meet the tender specifications. The tender required the bidder to submit a price for the four garbage collection vehicles owned by the City and a price for garbage collection expressed as being per capita per year. K. & E. was one of the five bidders and ultimately submitted the tender with the lowest cost to the City.

8. Generally, when the City awards a contract to a successful bidder after tenders are invited, the tender documents constitute the terms of the contract between the City and the successful bidder. However, after the tendering process, the City and K. & E. negotiated a contract for garbage collection with the same per capita per year rate as was in the bid by K. & E., but K. & E. did not purchase the City's vehicles and a number of the terms and conditions contained in the original tender documents were deleted from the contract.

9. The original tender prepared by the City contained detailed provisions relating to all aspects of the work to be performed by the successful bidder. The final agreement between the City and K. & E. provided as follows:

"WHEREAS the City has heretofore collected garbage within the City of Stratford using its own resources;

AND WHEREAS the City has called for tenders for refuse collection and haulage and K. & E. has submitted a tender pursuant to such tender call;

AND WHEREAS the City is desirous of awarding a contract to K. & E. for refuse collection and haulage;

AND WHEREAS because of certain proceedings being taken against the City by Local 197 of the Canadian Union of Public Employees it is not deemed desirable at this time to enter into the contract referred to in the tender call because of the term of the said contract;

AND WHEREAS the parties hereto wish to enter into a shorter term agreement on the terms hereinafter contained;

NOW THEREFORE the parties hereto agree with each other as follows:

1. Commencing October 1st, 1984, K. & E. will collect refuse within the City of Stratford and haul it to a landfill site with the level of service to be that called for by the above-mentioned tender call as set forth in the form of tender No. 84-003 including addendum No. 1 dated August 24, 1984 more particularly described in paragraph #7 hereof.

2. The City shall pay to K. & E. monthly, in the month following the date upon which the services required as aforesaid have been performed at the rate of 1/12 of the unit rate per capita per annum using the population base determined in accordance with Section 5, Paragraph #17 of the form of tender and as such population base might be amended from time to time in accordance with the form of tender during the term of this Agreement.

3. The per capita per annum rate shall be \$7.849.

4. Either party hereto may terminate this agreement by giving 35 clear days notice

in writing of intention to terminate, with the termination date to be the last day of the calendar month in which the 35 day notice period expires. Such notice shall be given in writing to the City by addressing it to the Clerk at City Hall, Stratford and to K. & E. by addressing it to K. & E. Solid Waste Management, 940 Murphy Road, P. O. Box 115, Sarnia, Ontario, N7T 7H8. Such notice may be given personally, or if by mail shall be sent by registered mail and shall be deemed to be given as of the time of mailing.

5. In the event that the City terminates this agreement with such termination to be effective within the first three months thereof, the City shall pay to K. & E. an additional sum of \$15,000.00 as compensation for the start up costs of K. & E., which start up costs would not be recoverable because of the short duration of the period of service. If this agreement is terminated after the first three months, the \$15,000.00 amount payable by the City to K. & E. upon termination shall be reduced at the rate of \$2,000.00 per month for each month after the first three months that this agreement is in force and refuse collected and hauled by K. & E.

6. If during the term of this agreement, the landfill site of the City of Stratford is closed so that refuse collected in the City of Stratford cannot be dumped in the said landfill site, it shall be the joint responsibility of K. & E. and the City to locate another landfill site suitable to the City and to transport refuse collected in the City of Stratford to such alternate landfill site. In such event, the charge of the landfill site for accepting such refuse from the City of Stratford shall be an additional charge by K. & E. to the City. In addition the City will pay to K. & E. an additional amount being \$1.60 per mile (one way only) for the distance travelled by the trucks of K. & E. from the City of Stratford to the landfill site, such distance to be determined by the City.

7. The level of service hereinbefore referred to is more particularly set forth in the above-mentioned form of tender Number 84-003, Section 5, Paragraphs 1, 2, 3, 4, 5, 6, 7 (except the second sub-paragraph) 10, 13, 14, and 15, and Schedules A, B, C and D hereto.

8. In addition, the provisions of Section 6, Paragraphs 6, 7, 8, 9, 10, 11, 14, 15, 16, 19, 22 and 23 of the said form of tender shall be binding upon the parties hereto and form part of this agreement.

IN WITNESS WHEREOF the parties have hereunto affixed their corporate seals duly attested by the hands of their proper officers authorized in that behalf.

THE CORPORATION OF THE
CITY OF STRATFORD

Per: "T. Blowes"

"Mayor"

Per: "R. Schulthies"

"Clerk"

K. & E. Solid Waste
Management

Per: "John Esser"

Per:

10. Section 5 of the tender documents which were incorporated by reference into the contract between the City and K. & E. provides, in part, as follows:

"Section No. 5 - Specifications for Refuse Collection.

2. STANDARD OF PERFORMANCE

All work to be performed under this contract will be supervised by and must be performed to [the] satisfaction of the City Engineer and be carried out in accordance with the provisions of the City's by-law for refuse collection attached and any subsequent amendments thereto. . . . Generally, the Contractor shall perform all services that are required to provide a complete refuse collection system *on the same basis as being provided by the Public Works Department, at the time of tendering*, except as specifically provided for in this tender and shall perform such services as are required, including but not limited to all those services described herein, to provide a complete collection system,

The special garbage collection for the elderly and physically handicapped will not be part of this contract but this service will continue to be provided by the City.

[emphasis in original]

3. LOCATION FOR REFUSE FOR COLLECTION

• • •

Where any commercial establishment, school, apartment building, group housing project or government building provides a properly designed, constructed and maintained paved area whereby the Contractor can safely drive onto the property to an exterior ground level refuse storage area located on or at the edge of the road system, turn around and return to the public highway, the Contractor will be required to provide this service if so directed by the City Engineer.

Where for any reason collection cannot be made from the locations specified in this section, items to be collected pursuant to this contract shall be placed at locations designated by the City Engineer.

• • •

4. NUMBER OF ITEMS FOR COLLECTION

• • •

There shall be no limit on the number or item of collectible refuse or waste materials that can be placed out for collection. Where possible items shall be placed in approved receptacles or properly tied in bundles to the limits as defined under Section 1 of these specifications.

It is not a requirement that large items of waste materials be dismantled. However items which are too large to be placed in the refuse collection unit must be picked up by the Contractor on the regular collection day under this tender.

5. CONTRACTOR'S COLLECTION DUTIES

The frequency and type of collection made from all properties throughout the City will be as contained in the Form of Tender and formalized by acceptance of the tender. The Schedules show the collection areas in the City of Stratford and indicate the approximate number of stops. These Schedules form part of the specifications for the performance of this contract. Furthermore, they will be subject to such additions, deletions or transfers as the City Engineer may deem reasonable and necessary to provide reasonable service to the citizens of Stratford. No additional payment will be made in regard to such changes, but compensation will be deemed to be included in the yearly adjustment of the City's population.

6. HOURS OF COLLECTION

Collection shall be made between the hours of 7:00 a.m. and 5:00 p.m. However, with the approval of the City Engineer, these hours may be extended from 7:00 a.m. to 6:00 p.m. from April 1st to October 31st.

7. EQUIPMENT

The Contractor will be required to supply the necessary number of refuse collection units with drivers and loaders, plus one standby-by unit sufficient to collect and haul to the Stratford Landfill Site, all refuse placed out for collection within the Municipal limits as shown on Schedule 'A'. The Contractor will not be required to carry out any operations at the Stratford Landfill Site except for dumping the material collected as directed by the Site Operators.

Units to be used for the performance of the services as herein provided must have fully enclosed steel bodies of sufficient capacity, capable of loading, compacting, and unloading the refuse mechanically, mounted on adequate truck chassis all to the approval of the City Engineer.

The Contractor will be responsible for maintenance, repairs and all other operating costs of the equipment supplied including but not limited to gas, lubricating, licensing, insurance, washing, storage, etc.

It should be noted that there may be periods of the year when a considerable amount of refuse will be placed out and it will be the Contractor's responsibility to provide sufficient trucks, and labour to handle these seasonal peaks, with each area to be completed on its regularly scheduled day.

10. CONTRACTOR'S OFFICE AND SUPERVISORS

The Contractor shall maintain an office within ten (10) miles of the limits of the City a no-toll-charge telephone, and one Work's Department extension at his expense at all times during the currency of the contract and such office shall be so staffed that during all normal working hours (8:00 a.m. to 5:00 p.m., Monday through Friday) complaints respecting the collection services may be received and processed by the said Contractor. Further, the Contractor shall have on duty on all collection days a qualified supervisor who shall have two-way radio contact with his office at all times so as to ensure adequate, courteous, speedy, and efficient service. The Contractor will be required to handle and record all complaints received, including a description of the corrective action taken, and shall deliver copies of the records to the City Engineer on a weekly basis.

14. NOTICE TO THE PUBLIC

The Contractor will be responsible for all notices to the public, including the preparation of and payment for all advertisements to announce his commencement of operations under this contract and any and all changes of service as required under the contract. Public notice as effectsthe City as a whole shall constitute advertising in the Beacon Herald and on the local radio station at least three (3) times starting one week in advance of the change. The size and/or duration and wording of the advertisement must be submitted to the City Engineer for his

approval one week prior to the submitting of the ad to the press. The printed ad shall conspicuously contain the City crest and the Contractor's name at the heading and be at least 7 cm by 15 cm in size unless otherwise approved. Of course, where the amount of detailed information required to be given to the public constitutes a large size ad, the Contractor shall comply. For localized changes in collection schedules, the Contractor may deliver at his expense hand bills to all affected householders, subject to the approval of the City Engineer."

Section number 6 of the tender documents incorporated by reference into the contract between the City and K. & E., titled "General Conditions for Refuse Collection Contract" states in part:

"9. ASSIGNMENT AND SUB-LETTING

The company shall not assign or sublet the contract or any part thereof or any benefit or interest therein, or thereunder, without the written consent of the City. The company shall be held as fully responsible to the City for the acts and omissions of its sub-contractors and of persons directly or indirectly employed by it as for the acts and omission of persons directly employed by it.

14. FORFEITURE OF CONTRACT

If the Contractor ... neglects or fails to commence operations on the specified date of commencement or if the contractor ... shall transfer, assign or sublet, or attempt to transfer, assign or sublet this contract, or any part thereof without the consent of the City, or if at any time the work or any part thereof is, in the judgement of the Engineer, not executed or not being executed in a sound or workmanlike manner to his satisfaction and in all respects in strict conformity with the contract, or if such work or any part thereof is not progressing continuously, and in such a manner as to ensure satisfaction, in the judgement of the Engineer or to comply to with any reasonable order he may receive from the Engineer, or if the Contractor shall persist in any course in violation of any of the provisions of the contract, then in each and every such case, after twenty-four (24) hours written notice from the Engineer to the contractor, the said Engineer shall have the full right and power, at his discretion, without process of action at law, to take over the whole operation, or any part or parts thereof specified in the said notice, and out of the hands of the contractor and the contractor upon receiving notice to that effect shall vacate possession and give up said operations or the part or parts thereof specified in the said notice, peaceably to the said Engineer, who may either relet the same to any other person or persons, with or without its previously being advertised or may employ workmen and provide the necessary plant at the expense of the contractor, or may take such other steps as he, the said Engineer, may consider necessary or advisable in order to secure the completion of the said contract to his satisfaction; and the contractor and his surety in every case shall be liable for all damages, expenditures and extra expenditure, and for all additional cost of the work which may be incurred by reason thereof. ..."

11. The following provisions contained in the tender document relating to the manner in which the work was to be performed were deleted from the contract between the City and K. & E.:

"Section 5 - Specifications for Refuse Collection.

7. EQUIPMENT

• • •

The City Engineer shall have the right to cause the Contractor at any time after the commencement of the contract operations to increase the number of collection units to such numbers or to modify the type of equipment as may be determined by the Engineer, thereby ensuring adequate performance of the contract, or to specify standby units in the event of breakdown....

8. CARE OF EQUIPMENT

All equipment purchased, acquired or supplied by the Contractor must be kept clean at all times, by washing at least once a week and more frequently as directed by the City Engineer. The Contractor shall be prohibited from displaying any advertising matter whatsoever on any of the collection units operated under the provisions of this contract. The City Engineer may require the Contractor to display such markings on his vehicles as the City Engineer may deem necessary to identify the said units as being operated as garbage collection units on behalf of the City.

9. EMPLOYEE'S APPEARANCES

The Contractor must ensure that all employees engaged in the collection services maintain at all times, while so engaged, a high degree of cleanliness. They must all wear the same type and colour of uniform or coveralls and an approved safety vest, safety footwear and gloves while engaged upon the refuse collection services and comply in all respects with the requirements of the Occupational Health and Safety Act.

11. OPERATIONAL DETAILS

For the first seven month period from October 1, 1984 to April 30, 1985 the Contractor must maintain exactly the same operational schedule and collections after holidays as are presently carried out.

The successful tenderer must submit to the City Engineer for approval not later than ten (10) days after the execution of the agreement a complete list of daily routes for collection to cover a normal week's operation showing the number of men and vehicles per route for the whole of the City.

12. CHANGES TO BE APPROVED

The successful Contractor will be encouraged to propose improvements to the existing garbage collection service. Such suggestions are to be submitted to the City Engineer and will receive full consideration, but the implementation of any changes to a collection schedule shall be approved by the City before the same become effective and the Contractor shall be responsible to advise the general public by prominent notices published in the local media of any changes in the days of garbage collection as detailed in Section 14 of this specification. Furthermore the Contractor must strive to maintain the greatest possible regularity in picking up garbage from all points of collection, so that his times of call at the various locations will be very similar from week to week.

Section No. 6 - General Conditions for Refuse Collection Contract.

13. DISCIPLINE OF EMPLOYEES

Should any overseer, mechanic, driver or workman employed on or about the work or in connection therewith, give any just cause for complaint (of which the Engineer shall be the sole judge), the Engineer shall notify the contractor in writing, stating the reasons therefore, and the contractor shall discipline such person forthwith to the satisfaction of the Engineer and he shall not again be employed by the contractor on any City work without the consent in writing of the Engineer."

12. The original tender required the successful bidder to purchase the City's garbage collection vehicles but did not require the successful bidder to use the City's vehicles. The prices submitted by the bidders included a figure for the purchase of the vehicles. The contract between the City and K. & E. did not contain any provision relating to the purchase of those

vehicles. Mr. Esser testified that he had no intention of using the City's vehicles for a number of reasons relating to efficiency, reliability, productivity, and operating costs. He had arranged to sell them to a purchaser of used garbage trucks located in Brantford, Ontario, before the contract with the City was negotiated and entered into which relieved him of the obligation to purchase the City's vehicles.

13. The changes between the tender document and the contract ultimately entered into between the City and K. & E., as is made clear by the fourth paragraph of the recitals in the contract, were made with the knowledge that the union had initiated proceedings before the Board challenging the propriety of the contracting arrangement in respect of the garbage collection work required by the City. Whatever may have been the City's intention when it originally invited bids on the work as can be derived from the tender documents, we are satisfied that the contract between the City and K. & E. reflects the actual nature of the working relationship between the City and K. & E. that commenced on October 1, 1984. While K. & E. may have been obliged to accept all of the tender's provisions when the City accepted K. & E.'s bid, the City and K. & E. mutually agreed to a contractual arrangement that differed from the original tender.

14. K. & E. began the garbage collection work pursuant to its contract with the City on October 1, 1984. K. & E. transferred employees from its other locations to Stratford, placed them in a motel, and paid them room and board in addition to their weekly salary. K. & E. also initially used two of its own trucks that it had been using to perform garbage collection work for the City of Sarnia. It later began using a loaner vehicle from a garbage truck manufacturer after sending one of its own trucks back to Sarnia. K. & E. obtained the loaner because it had ordered a new truck, at a cost of \$112,000 and was awaiting delivery of it. The trucks used by K. & E. to perform the work required by the contract between it and the City are painted in K. & E.'s distinctive colours and have the K. & E. logo and motto on them. The employees who perform the work wear K. & E. uniforms and are directly supervised by Dan Dennis, a foreman for K. & E. who also works on the trucks. K. & E. establishes the wage rates payable to those employees. The contract price for the services performed by K. & E. is not a direct function of the number of employees performing the work, or the number of hours worked by those employees, or the wage rates of those employees. The City's supervisory staff do not monitor those employees' day to day work performances, although the City's staff will ensure that the garbage collection is carried out. Any complaints about the work done by K. & E. that are received by the City are referred to K. & E. The City does not establish or schedule the working hours, working days, holidays, vacation or time off for any particular employee performing work for K. & E. under its contract with the City, although the contract does require that garbage collection be carried out between certain hours of the day and that particular areas of the City have their garbage picked up on certain days of the week.

15. Section 210 of the *Municipal Act*, R.S.O. 1980 c. 302 provides:

"By-laws may be passed by the councils of local municipalities: ...

83. For establishing and maintaining a system for the collection, removal and disposal of garbage or of garbage and other refuse or of ashes, garbage and other refuse, *and for contracting with any person* for the collection, removal and disposal by him of ashes, garbage and other refuse upon such terms and conditions as may be considered expedient"

[emphasis added]

16. The City enacted By-law No. 2034, on April 20, 1914 to establish a system of garbage collection and disposal for the City. Sections 2 and 3 of that By-law stated:

“The collection and removal of such ashes, garbage and other refuse may be either by contract entered into with some person or persons for that purpose or by other means as may be from time to time determined by the Council of the said Corporation and the collection and removal of such ashes, garbage and other refuse shall be under the supervision of the City Engineer, subject to such by-laws and regulations as may be made from time to time.

Routes shall be established, for the collection of such ashes, garbage and other refuse by the Collectors thereof under the supervision of the City Engineer, who shall thereupon cause notice thereof to be given by publishing the same in one or more newspapers published in the City of Stratford.”

[emphasis added]

17. By-law no. 2034 and amendments to that By-law were repealed by By-law 126-63 that was passed by the City on October 21, 1963. That By-law provided in part:

“The Corporation of the City of Stratford shall through the Board of Works Department provide for the collection, removal and disposal of household garbage, refuse and ashes throughout the City of Stratford.

The City Engineer shall be responsible to the Municipal Council for the efficient and orderly collection, removal and disposal of such household garbage, refuse and ashes and the Council may from time to time provide for all things necessary to the due fulfillment of the objects of this By-law including providing all equipment and labour, providing areas for the disposal of garbage or for its incineration, *provide for the collection or disposal of such garbage either by regular employees of the City of Stratford or by contract or any other manner considered advisable* and shall generally have control of the collection, removal and disposal of household garbage, refuse and ashes.”

[emphasis added]

18. Counsel for the Union submitted that the relationship between the City and K. & E. gives rise to a significant degree of control by the City over the way in which K. & E. performed the work under its contract with the City. He submitted that the City and K. & E. are engaged in related activities, and there is, at the very least, shared control over the work performed by the employees pursuant to that contract. Counsel further submitted that the degree of control exercised by the City is sufficient for the Board to find that the employees who perform the work for K. & E. under the contract with the City are, for purposes of the *Labour Relations Act*, employees of the City and not K. & E. Counsel for the Union also requested that the Board declare that the City sold a part of its business, that is, the refuse collection activity, to K. & E. through the tender and contractual arrangements that the City and K. & E. had entered into.

19. At the conclusion of Union counsel’s argument, the Board advised counsel for the respondents that it did not need to hear from them with respect to the submission that the City was the actual employer, for purposes of the Act, of the employees performing work for K. & E.

20. Those employees were hired by K. & E., and had been trained by it. Their day to day direct supervision is carried out by K. & E.’s foreman, who is ultimately responsible

to Mr. Esser, president of K. & E. Their wage rates, hours of work, vacation and holidays are determined by K. & E., without reference to the City. The disciplinary authority over the employees rests with K. & E. They work on vehicles owned by K. & E., wear uniforms supplied by K. & E., and are issued pay cheques by K. & E. Both K. & E. and the City regard K. & E. as the employer of those employees.

21. The Board has in numerous cases been required to determine which one of two or more persons is the employer for purposes of the *Labour Relations Act* of certain employees. The Board's determination of that issue requires it look at the actual working relationship between the employees and the person who claims to be their employer or are alleged to be their employer. The Board has developed numerous criteria which it uses in assessing those relationships. See, for example, *York Condominium Corporation*, [1977] OLRB Rep. Oct. 642 where the Board set out a list of factors which it considered relevant to the determination of that issue at page 645:

- “(1) The party exercising direction and control over the employees performing the work. - See the *Municipality of Metropolitan Toronto* case, 61 CLLC 16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. 753, 761.
- (2) The party bearing the burden of remuneration. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. 487, 488; the *Beer Precast Concrete Limited* case, *supra*; the *Kel Truck Services Ltd.* case, 1972 CLLC 16,068; and the *Templet Services* case, [1974] OLRB Rep. 606, 608.
- (3) The party imposing the discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party who is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.”

The object of analyzing the facts in any given case where the identity of the employer is an issue is to determine who “exercises fundamental control over the working lives and working environment” of the employees, because the person who exercises that degree of significant control over the employees’ working lives will be found to be the employer of those employees for purposes of the Act. (See *Sutton Place*, [1980] OLRB Rep. Oct. 1538; *K-Mart Canada Limited*, [1983] OLRB Rep. May 649 and *Kennedy Lodge Incorporated*, [1984] OLRB Rep. July 931 at 956-963.)

22. The circumstances of the employment relationship of the employees who perform the garbage collection work for K. & E. under its contract with the City convinced us that

K. & E. and not the City is their employer for purposes of the Labour Relations Act. K. & E. is the person that exercises fundamental control over those employees' working lives. The City does not directly supervise or monitor those employees and any contact between the City and K. & E. which arises because of complaints received by the City or problems observed by the City's employees is made with K. & E.'s supervisory or managerial employees. It is K. & E., and not the City, that hires and disciplines them, that is ultimately responsible for paying them, that provides them with the equipment necessary to do the work and holds itself out as their employer. Thus, we were satisfied that K. & E., and not the City is the actual employer of the employees in question.

23. The Union's request that the Board find that the City sold part of its business to K. & E. is based on section 63 of the Act. The relevant portions of that section provide:

"63(1) In this section,

(a) 'business' includes a part or parts thereof;

(b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union ... sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereof"

In order for the union to establish its entitlement to a declaration that the City has sold part of its business to K. & E., it must persuade the Board that the garbage collection service that the City provides to its residents is a part of the City's business within the meaning of section 63 of the Act and that the transaction between the City and K. & E. was a sale of that business, as defined by section 63(1) of the Act, from the City to K. & E.

24. It is clear to us that, at the very least, the garbage collection service provided by the City to its residents was part of the City's normal activities or business, in the same way that any other municipal services provided by the City to its residents are part of the City's business or the physical assets, such as any City owned property, buildings, machinery or equipment are a part of the City's business.

25. Section 63 of the Act does not define the term "business" other than by stating that it "includes a part or parts thereof". Therefore, it is left to the Board to interpret the term "business", as used in section 63 of the Act, in a way which is sensitive to the purposes of the Act as a whole, and section 63 in particular, but having regard to the almost infinite variety of economic relationships to which the Act applies. The Board recognized that the activity of the entity which is subject to an application under section 63 will affect, to a substantial degree, the significance the Board will ascribe to the various parts of that entity that have been transferred when less than all of it is sold, in assessing whether there has been a sale of part of a business. The Board in *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536 wrote at 543:

"The term 'business' is at the heart of section 63, but it is this concept which is the most difficult to define. One usually thinks of a business as a profit-making economic activity, but in the *Labour Relations Act*, the term cannot be so restricted. The Act applies to municipalities, public libraries, universities, school boards, hospitals, and other non-profit

service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of 'business' must be broad enough to include them. And in the case of undertakings in the service sector, such things as 'know how', managerial systems, and other intangibles may be much more important factors in the overall organization than a particular physical plant or configuration of assets."

26. The Board has previously indicated that the purpose of section 63 of the Act is to provide a much higher degree of stability to a collective bargaining relationship than would otherwise exist if collective agreements or bargaining rights were treated in law in the same way as are commercial contracts or rights created under commercial agreements. Collective agreements and bargaining rights are different. They are accorded significant protection by the *Labour Relations Act*. The Board, in *Marvel Jewelry Limited*, [1975] OLRB Rep. Sept. 733 capsulized the import of the Act in the following way at page 735:

"Section 55 [now 63] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business regardless of any change of ownership."

The Board further elaborated and explained the effect of section 63 in *The Charming Hostess Inc.*, *supra*, at page 542:

"When a business or part of a business is disposed of, the transferee acquires it subject to the collective bargaining obligations of his predecessor. Section 63 preserves the labour relations status quo by transforming collective bargaining rights into a form of 'vested interest', which attaches to the business entity, and like a charge on property 'runs with the business'. To accomplish this objective the statute gives a special meaning to the term 'sale', *envisages the continuation of bargaining rights in a severable 'part' of an employer's operation*, abrogates the notion of privity of contract, and virtually eliminates the significance of the separate legal identity of the new employer. Collective agreements are not treated like ordinary contracts, nor are a union's representation rights co-extensive with commercial ownership."

[emphasis added]

27. Where a vendor sells every element of its business directly to one purchaser who continues the vendor's business, the Board will find that such a transaction constitutes a sale of a business within the meaning of the Act. However, where one purchaser obtains less than all of the elements of the vendor's business, the Board may or may not find a sale of a part of a business, and the Board's determination will ultimately depend on what elements of the predecessor's business were sold to the purchaser. The Board commented on this in *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581 at 589:

"Almost anything actually traceable to the predecessor could be regarded as 'part' of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this, would make section 55 [now 63] the vehicle for extending rather than preserving bargaining rights."

Assets are part of a business, as are the services the business provides. A sale of a part of a business within the meaning of the Act does not arise every time a discrete element of that business, such as single piece of equipment, is sold. Section 63 of the Act is concerned with

preserving bargaining rights when there is a disposition of a combination of elements that create employment. In *Beef Terminal*, [1980] OLRB Rep. Aug. 1167, the Board reviewed its earlier cases dealing with sales of a part of a business, and commented at 1177:

"In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, 'knowhow' or goodwill, - thereby allowing the successor to perform the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. In all of these cases there was a transfer of a distinct part of the predecessor's configuration of assets and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of the employee complement; and, but for section 55 the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied."

28. In the case before us, K. & E. is now performing, with its own employees, most of the garbage collection work that the City had previously performed. K. & E. was a pre-existing entity with its own management structure, capital assets, employees, entrepreneurial initiatives and business skills. We are satisfied that the City transferred to K. & E. the work that it no longer wished to perform. A similar issue arose in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 where the Board wrote at page 74:

"There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer."

The determination of whether a transaction constitutes a sale of a business, or whether it amounts to something less than a sale, is one that must be made on the facts. The question in each case is whether the evidence points to a continuation of the same business function as was carried on prior to the transaction. As the Board pointed out in *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, for a transaction to be considered a sale of a business there must be the continuation of the same business, and not merely the performance of a like function by some other business. The Board, in making this distinction, must look beneath the form of the particular transaction to uncover its essential nature. As in the instant case, a number of considerations must be taken into account before the Board can ascertain the true nature of the transaction."

See also *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293; *474619 Ontario Ltd.*, [1981] OLRB Rep. Oct. 1452; *Superior Sanitation Services Limited*, [1968] OLRB Rep. July 395.

29. The Board in *Metropolitan Parking Ltd.*, [1979] OLRB Rep. Dec. 1193 considered the various ways in which one employer could arrange its affairs so that another employer would perform the work that had been previously performed by the first employer when it wrote at page 1210-1211:

“The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. *Work or services performed by A's employees within A's own organization are 'contracted out' to B, and B uses his own managerial skills, plant, equipment and 'know how' to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two business will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business.* If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer or 'part of a business') or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, 'but for' the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.

Similar considerations apply where A, for his own business reasons, chooses to change subcontractors and purchase his requirements elsewhere. Here also there would be a continuation of the work performed, and the new subcontractor may find itself in the same position of economic interdependence vis-a-vis A as a previous subcontractor. Again, these factors do not, in themselves, determine the applicability of section 55. Essentially the matter remains one of characterization. Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor? Has the successor acquired all, or a coherent and severable part, of the predecessor's economic organization? And to repeat the words of Widjery, J. in *Kenmir*, *supra* has the transaction put the successor in possession of a going concern, the activities of which he could then carry on without interruption? A transfer of work, by itself, is simply not enough to ground a section 55 finding.”

30. In our opinion, the transaction between the City and K. & E. comes squarely within the sub-contracting arrangement described by the Board in the emphasized portion of the *Metropolitan Parking Inc.* decision referred to above. The City contracted with K. & E. to have K. & E. perform the services for its residents that had formerly been carried out by its employees. The methods and equipment K. & E. uses to perform those services were not provided by the City, although we do recognize that the work had to be performed within certain hours and pick-ups had to be made in specified areas on certain days. In our view, K. & E., an established employer who has carried on the business of garbage collection for several years, contracted to perform the work for the City. There was a transfer of work from the City to K. & E. There was not a transfer of a part of the City's business to K. & E.

31. In addressing the union's application for a declaration under section 1(4) of the Act that both respondents are one employer for purposes of the Act, the Board must examine the activities engaged in by the respondents, where the control of those activities rests, and whether the Board, if it is satisfied that the conditions precedent to the Board having the authority to grant the declaration have been met, should exercise its discretion to do so. Section 1(4) of the Act provides:

“1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation ... under common control or direction, the Board may, upon the application of any person, trade union ... concerned, treat the corporations ... as constituting one employer for the purposes of this Act and grant such relief, by way of declaration, or otherwise, as it may deem appropriate.”

32. The activity of the City relevant to this case is the garbage collection service for its residents. K. & E. began performing that same activity on behalf of the City. Therefore, both the City and K. & E. carried on the same activity, albeit at different times. Therefore, the City and K. & E. carried on related activities, and because K. & E. and the City are two corporations, we are satisfied that two of the three requisite conditions for the Board to have the authority to grant a declaration under section 1(4) have been met. However, the Union must also persuade us that the activities are carried out under common control or direction.

33. K. & E. is owned and operated, but for its contractual arrangement for garbage collection with the City, completely independently of the City. None of the City's administration or officers are in any way connected with K. & E., and none of K. & E.'s shareholders, officers or management are connected with the City. Therefore, if common control or direction exists between the City and K. & E., it must be found in the degree of authority that the City can or does exercise over K. & E.'s operations for the City.

34. Counsel for the Union argued that section 1(4) of the Act is intended to permit the Board to require the entity that possesses or exercises “real economic power” over employees, or their employer, to bargain directly with the Union that represents those employees, and cites *Penmarkay Foods Ltd.*, [1984] OLRB Rep. Sept. 1214. The Board in that case referred to *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008 and *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 as authority for that proposition. In our view, the concept of one entity exercising “real economic power” over another entity's employees involves more than merely a commercial arrangement where the supplier of goods or services is dependent upon a particular customer who may be an important or exclusive source of revenue for the supplier. In each of the cases referred to above, the entity that was found to have “real economic power” over the employees played an important role in the establishment of the employees' nominal employer's business or activity that was the subject of the application and was intimately involved in that employer's operations.

35. In *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931, the Board found that a nursing home and the personnel agency with whom it contracted to supply nursing care services exercised common control or direction over the employees involved in the day to day operation of the nursing home. The Board in that case relied, in large part, in finding there was common control or direction on the very close degree of co-ordination and supervision of the work of the employees by both the nursing home and the personnel agency. The Board in that case also commented at page 967:

“It is one thing to contract out the performance of peripheral activities (a hospitality suite where brewing is the core activity or the washing and rust proofing of automobiles where the selling of cars is the core activity) over which fundamental control can be easily relinquished, as it was in those cases. It is much more difficult to relinquish fundamental control over the core activities of the business.”

36. The Board earlier, in *Complete Car Care Centre*, *supra*, commented on the impact of section 1(4) upon contracting out arrangements at page 1298-99:

"The Board has previously accepted the proposition that sub-contracting relationships can under certain circumstances bring two nominally independent firms within the ambit of section 1(4). As was stated in the *Charming Hostess* case [1982] OLRB Rep. April 582, the more closely a firm which has contracted out work controls when, where, how, by whom and at what place the work is to be done, the more the activities of the two firms will appear to be under joint control or direction. Indeed, the degree of control may be so great as to lead to the conclusion that the firm allegedly contracting-out certain work is in fact the true employer of the individuals performing it, and that they are not employees of the 'sub-contractor' at all. See: *K Mart Canada Limited*, [1983] OLRB Rep. May 649. In addition, a section 1(4) declaration may be appropriate in instances where a sub-contractor is effectively dominated by the firm letting out the work, and it appears the true purpose of the sub-contract was not to provide the dominant firm with independent managerial or employee skills, but rather to provide it with a separate 'non-union' corporate vehicle with which it could continue performing the same work as before but outside of any collective bargaining obligations. See *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176 and *Donald A. Foley Limited* [1980] OLRB Rep. Apr. 436."

The Board there found that the contracting out arrangement did not establish a situation of common control and direction. The Board also stated at page 1299:

"In assessing the circumstances of the case before us, we consider it noteworthy that there is apparently an accepted practice in the automotive dealership field of contracting out the washing and rustproofing of cars. One can infer from this that the work involved is not viewed as being so integral or 'core' to the operation of a dealership that the management of the dealership must keep direct control over the performance of the work."

37. More recently, the Board in *Caressant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. Jan. 50 also discussed a contracting-out arrangement and the effect of section 1(4) on that arrangement at page 53-54:

"In *Kennedy Lodge*, the Board introduced the terms 'core' and 'peripheral' functions, in commenting upon the question of community perception. ... Without seeking to define any further the terms 'core' and 'peripheral', we would simply observe that the contracting out of the kind of work involved here, in terms of food services and housekeeping services, would not seem to offend the sensibilities of the labour relations community in the way that the purported contracting-out of direct nursing care does. And indeed the history of companies like Versa Services in providing these services within the health care industry of the province makes it difficult for anyone to argue 'surprise' over a development like the present. In any event, as the Board noted at the end of its comments with respect to community perception in *Kennedy Lodge*, the question before the Board and arising under the Act remains one of intent, and of 'control', and we find nothing in the evidence before us to suggest anything but a *bona fide* intent to hand the responsibility for these severable aspects of the Home over to the business organization of Versa Services. Whether these are areas, as they obviously are, which are integral to the continued operation of a nursing home, and with respect to which a strike could obviously cause disruption, and whether as a result the employees engaged in these on-site activities fall under the *Hospital Labour Disputes Arbitration Act*, as they obviously do, does not assist the Board in assessing on a case by case basis the degree of responsibility given up in a particular 'subcontracting' arrangement, and that remains the issue for the Board under section 1(4) of our Act."

38. We do not need to decide in this case whether garbage collection work is a core or a peripheral function of the business of the City. The evidence before us makes it clear that it is not unusual for municipalities to contract out that kind of work. The *Municipal Act* and the City's By-Laws have, since 1914, contemplated the contracting out of garbage collection. Indeed, article 25 of the collective agreement between the City and the Union, which states:

“25. *JOB SECURITY*: The Corporation agrees that no employee shall have his employment terminated or his earnings adversely affected as a result of contracting-out work normally performed by members of the bargaining unit.”

expressly contemplates contracting out. We note that the Union had not filed a grievance alleging a violation of the collective agreement.

39. The City has given up the functional control over the employees who perform the work in question. The control the City does have in relation to the work performed by K. & E. is the kind of commercial control the Board adverted to in the *Caressant Care Nursing Home of Canada Limited* case, *supra*, at page 51:

“There is no doubt that all of the services provided by Versa Services or any contractor to the licensee of the Home would have to be carried out under the ‘general direction’ of the licensee, and the contractor remains ‘responsible’ to the licensee, as Exhibit 3 stipulates, for it is the licensee itself who at all times remains ultimately responsible for the maintenance of adequate care in the Home. But the specific options reserved to Caressant Care under this arrangement we find to be no more than a customer could normally expect to have access to, either expressly or as a matter of commercial reality, in ensuring that the performance of the contractor continues at all times to meet its general specifications and requirements. We recognize that there is in any business relationship, apart from perhaps fixed-term contracts, the right of termination of the arrangement by the customer which, as a practical matter, requires a contractor to be more or less responsive to, any complaints by its customers. The question is whether, on an on-going basis, the contractor really has taken over control and responsibility for the selection, training and supervision of the employee workforce, and is truly independent in making the decisions that it does.”

That degree of control does not, in our opinion, establish that the City exercises “real economic power” over K. & E., nor are we persuaded that the on-going relationship between K. & E. and the City, as described earlier, evidences common control or direction of the garbage collection work in the City by K. & E. and the City.

40. Therefore, since the City and K. & E. are not under common control or direction and having regard to our determination in paragraph 30, above the applications in Board File Nos. 1691-84-R and 1692-84-R are hereby dismissed.

41. As we indicated at the outset of this decision, the complaint in Board File No. 1415-84-U was held in abeyance pending the determination of the Union’s applications in Board File Nos. 1691-84-R and 1692-84-R. Therefore, with those applications being disposed of herein, the Board hereby refers the proceeding in Board File No. 1415-84-U to the Registrar to be re-listed for hearing before this panel of the Board.

0861-84-U Retail, Wholesale and Department Store Union AFL-CIO-CLC Complainant, v. **T. Eaton Company Limited**, The Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited Respondents

Constitutional Law - Interference in Trade Unions - Unfair Labour Practice - Union solicitation in restaurants in shopping mall prohibited - Employees prevented from engaging in union activity in store sales areas and mall areas - Whether mall owner acting on behalf of employer - Relevance of Trespass to Property Act - Board balancing private property rights with union's rights to organize - Requiring risk of actual interference with commercial interest - Finding blanket prohibition unlawful in circumstances - Whether Board having jurisdiction to apply *Charter of Rights* - Relevance of Charter to rights between private citizens

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members A. Grant and L. C. Collins.

APPEARANCES: James Hayes, Patrick Macklem and Hugh Buchanan for the applicant; Harvey Beresford, Q.C., Nancy Eber and R. A. Hubert for T. Eaton Company Limited; W. J. McNaughton for The Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited.

DECISION OF THE BOARD; June 12, 1985

I. The Complaint and Facts

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent T. Eaton Company Limited (hereinafter referred to as "Eaton's") and the respondent Cadillac Fairview Corporation Limited (hereinafter referred to as "Cadillac Fairview"), acting on behalf of Eaton's, have violated the section 3 rights of employees of Eaton's, in violation of section 64 and 66 of the Act.

2. The complaint centres around the efforts by the complainant to organize the employees of Eaton's at its "flagship" store in the Toronto Eaton's Centre (hereinafter referred to as "T.E.C."). The unusual feature of this store, apart from its size, is that none of the employee access-points abut public property; rather, all are contained within the private property of the Eaton's Centre Mall itself. There are approximately 3000 retail employees employed by Eaton's in the T.E.C. store, of whom more than half are part-time. The complainant in 1984 enjoyed success in obtaining certification for a number of Eaton's stores in the Toronto area and beyond, and the central thrust of this complaint is that the efforts to achieve a similar success at the Eaton's Centre store have been stymied by the fortuitousness of its physical location. The complainant did have success in organizing the Eaton's Scarborough store, located at one end of the Scarborough Town Centre Mall, but the evidence is that because of the small size of that store, the employees on the in-store organizing committee were able to obtain sufficient cards on their own. No further details of the physical characteristics of that store and Mall are before the Board.

3. Actual ownership of the full property underlying the Eaton's Centre was described to the Board as a complex matter, but for our purposes it is sufficient to note that the head leasehold interest in the full package is held by a company formed for that purpose and called T.E.C. Leaseholds Limited. The ownership of that company is made up as follows:

60%	Cadillac Fairview
20%	Toronto-Dominion Bank
20%	Eaton's

The Board of Directors of T.E.C. Leaseholds Limited shows seven directors from Cadillac Fairview, two from the Toronto-Dominion Bank, and two from Eaton's. Day-to-day management and control of the Mall has been left wholly to Cadillac Fairview, and all of the officers of T.E.C. Leaseholds Limited are from Cadillac Fairview.

4. The quality of presentation in this matter was extremely high, and all counsel recognized that there were relatively few significant factual issues in dispute. The complainant's first success in organizing within the Eaton's chain arose out of a chance encounter at Eaton's Bramalea store around Christmas of 1983. The first meeting with Brampton employees took place on February 2nd, 1984, and eight days later the complainant's first application for certification was before the Board. Fanned by the publicity arising out of the Bramalea success, the organizing campaign quickly spread to other Eaton's stores, and during the spring of 1984 other applications for certification were being brought before the Board. The course of the campaign with respect to the Eaton's Centre store itself was testified to by Carole Currie, a staff organizer for the complainant and one of the principal co-ordinators for this store. Her evidence attempted to recount events many months prior, and was itself protacted over an extended period of hearing days; as a result, her evidence is not entirely clear, or even consistent, with respect to *all* points, especially early in the campaign. The Board is, however, able to put together from her evidence an account of the campaign that is sufficiently clear insofar as the facts that are material to the issues in this complaint are concerned.

5. The first contact with staff at the Eaton's Centre store took place on March 8, when organizers went through the store and handed out informational material and business cards. From that a meeting took place at the home of one of the employees. There it was decided that the employees present should try to get others by word of mouth to attend a further meeting on March 20th at the Bond Place Hotel. That meeting took place in two shifts, with about 65 people attending in total, and certain pieces of literature explaining employees' rights and who the complainant was were distributed. The meeting also discussed a letter in relatively standard form sent by Eaton's to the employees at all of its stores on March 15, 1984. That letter simply set out Eaton's position as follows:

TO: ALL EMPLOYEES

A union is now attempting to organize some employees. Many of you are wondering and asking why Eaton's has not discussed this with you in our normal way. We think you are entitled to an explanation. Over the years we have tried to keep employees aware about what is taking place. We normally communicate via department meetings, communication meetings, video presentations, written communiques, and so on.

In the present circumstances, the law restricts us in what we may say to you. For example, a union may promise you many things to persuade you to join; however, all employers are prohibited from promising you anything such as better salaries, benefits, or working conditions. We feel this is a bit unfair but on the other hand, what value can you place on union promises which may not be obtainable?

We believe that you are entitled to know about some of the more important things in being represented by a union, which may not be known by you. Accordingly, we are attaching a summary of these for your information.

If you join a union, you are immediately committed to all of the conditions of its constitution. These place new responsibilities on you and, if you fail to live up to them, the union may discipline you by penalties such as fines. To understand your commitments, you should ask for a copy of the union's constitution. Read it carefully before agreeing to its conditions by signing a card. After all, a union should not expect you to sign a "blank cheque".

Eaton's does not believe that you need a union, particularly if the costs such as dues or possible strikes, are taken into account. However, this is for each individual employee to decide on her/his own. Importantly, no person representing Eaton's or a union is allowed to interfere in your decision. For example, you cannot be threatened with losing your job by signing or refusing to sign a union card. In the final analysis, the choice is yours.

Yours sincerely,

W. Stark,

Company General Manager-Personnel.

6. A number of employees at the Eaton's Centre store volunteered to act as in-house organizers, and were given copies of a notice of a March 26th meeting to hand around at breaks and after work, or to leave in washrooms. Ms. Currie, one of the complainant's coordinators for the Eaton's Centre store, acknowledged with respect to documentation generally that it was the complainant's aim to get as much of the literature into the store as possible, and that that literature could and sometimes did become the focus of lively discussion in the store. At the March 26th meeting some 350-500 employees attended, and more volunteers for in-house organizing were obtained. A further meeting was scheduled for April 11th at the Sheraton Centre, and an attempt was made to distribute copies of the notice to employees in areas of the Mall outside the Eaton's store. The distributors were told, however, that they were not permitted to do that, and so removed themselves to the vestibule area of the subway, where they resumed distributing. They were immediately stopped, however, by inspectors for the T.T.C., who told them that soliciting on T.T.C. property was not permitted. No further efforts at distribution were made at that time. On the day of the meeting, however, it was decided that the meeting had to be cancelled because of a Hotel strike, and a group of volunteers from other stores were organized to proceed through the Eaton's Centre store and drop notices of the cancellation. The meeting itself was re-scheduled for April 23rd, and approximately 200 employees attended.

7. It should be noted that certain correspondence was changing hands between Eaton's and the complainant with respect to the ongoing campaign to organize stores of Eaton's in general, and on May 1, 1984, the complainant wrote to Eaton's as follows:

Mr. Robertson
Eaton's Store Manager
Eaton's Centre
Toronto

Dear Sir:

As you are aware, the Retail, Wholesale & Department Store Union, AFL-CIO-CLC is presently involved in an organizing campaign in the place of business known as The Eaton Co.

As you are further aware, this Union has found it necessary as of April 12, 1984 to file with the Labour Relations Board of Ontario a complaint under Section 89 with regards to the actions of one of your subordinate, namely a Mr. Horst Wolt.

Further to this, it has come to our attention that other members of your management staff are acting in a manner that we deem to be in contravention of the Labour Relations Act, namely Section 3, 64, 66 and 70.

We understand that you may not be fully aware of the rights of your employees during this time, therefore, we would suggest that you contact your superiors and seek counsel of them. The following are the names of your management personnel who also need instructions in this matter.

Mr. Noel Kerr	Ms. Suzanne McLean
Mr. George Cloak	Mr. Steve Chandler
Mr. Steve Wickett	Ms. Kim LeCass
Mr. Percy Stein	Stasha MacTavish

Yours truly,

John Clark,

Staff Representative,

Organizer

Eaton's responded with its letter of May 9th, which reads:

Dear Mr. Clark:

During the last several months you have written some of our Store Managers making reference to your organizing campaign and Section 3 R.S.O. 1970.

While you have drawn this matter to our attention you do not mention the legislation in question. We assume you are referring to R.S.O. 1980 Chapter 228, the current Labour Relations Act for Ontario.

Our Managers are fully aware of the legislation in terms of the rights of employees and employers.

It is important at this time to inform you that union supporters in Stores that are certified, as well as those that are not, continue to harass and apply coercive pressure on employees to join the union. Employees generally have been informed that the Law prohibits solicitation for union members during working hours and further that solicitation is prohibited by Company Policy. Should this type of behaviour continue, employees will be subject to appropriate disciplinary action.

In addition, a number of your supporters are telling employees that they will be fired if they do not sign a union card. This type of misrepresentation will be corrected by our Managers

and they will continue to answer questions and clarify matters that arise in discussions. These types of statements constitute threats and are prohibited by Law.

The Company has always conducted its business in a manner that encourages employees to be courteous to our customers and co-operative and courteous with each other.

These devisive tactics being used by the union supporters are creating an atmosphere of tension and friction which is not in the interest of employees or the Company.

Yours very truly

Ronald A. Hubert
Company Employee
Relations Manager

8. At about the same time, the Toronto Globe & Mail carried an article on the organizing campaign underway at the Eaton's Centre store, and this was made into a leaflet by the complainant. It was mailed, together with notice of a further meeting, to employees for whom addresses were known (being generally, those who had previously applied for membership). That notice read:

Employee
T. Eaton Company
Toronto Eaton Centre
Dear Friend:

On behalf of the Retail, Wholesale and Department Store Union, I would like to take this opportunity to congratulate you on the amazing progress that you have made during this campaign in organizing your fellow employees.

Following certification of your bargaining unit, you and your fellow full time, part time, occasional and student employees will have successfully achieved your right to bargain collectively with your employer.

We ask you to encourage your fellow employees to become part of your winning team. Get them involved so that they too, may become participants in their own futures. Invite them to attend their floor by floor union meetings (or any other floor meeting convenient to them) to be held at the:

Bond Place Hotel, 65 Dundas St. East, Picadilly Room, Continuous Meeting from 6:30 p.m. on

Floors 4 and 7, May 22, 1984
Floors 2 and 3, May 24, 1984
Main Floor, May 28, 1984
Two Below, May 29, 1984
One Below, May 30, 1984
Floors 5 & 6 Organizing Committee May 31, 1984
Three Below, May 23, 1984 (at 4:30 p.m.)

Exercise Your Legislated Rights. Become the "U" in your Union.

Yours in Solidarity,

Carole M. Currie,

Home 638-5280
 Organizer
 Retail, Wholesale & Department
 Store Union Organizing
 Committee

A broader distribution of this material was planned by way of a drop throughout the store, using both employee and non-employee volunteers, but plans were changed following receipt of the following May 18th letter from the company:

Mr. A. Scott
 Director
 Department Store Organizing Committee
 Retail, Wholesale and Department Store Union
 Suite 102
 15 Gervais Drive
 Don Mills, Ontario
 M3C 1Y8

Dear Mr. Scott:

In addition to the improper tactics by your representatives in connection with the solicitation of support for the Union on our premises to which we objected in our letter of May 9, 1984, there has been an increase in the dissemination throughout our premises of Union meeting notices by Union representatives or Union supporters. Recent examples of this happening occurred at:

Don Mills - May 9, 1984
 Yorkdale - May 11, 1984
 Oshawa - May 11, 1984
 Sherway - May 16, 1984

The unauthorized entry into our Stores in handing out such leaflets and unauthorized solicitation disrupts our business by interrupting the work of our staff, interfering with customer relationships and causing an unsightly housekeeping problem as the notices are discarded.

Never in our experience have we encountered Union supporters rushing through the Stores, interjecting leaflets in front of customers making a transaction, dropping batches of leaflets at various places, all conducted with considerable dispatch to prevent being identified or stopped.

We expressed our strong disapproval of the actions of your Union and its supporters to your International Representative, Mr. Thomas Collins and your Business Agent, Mr. Robert McKay on May 16, 1984. Despite this, again yesterday such actions occurred at:

Toronto Eaton Centre - May 17, 1984
 Toronto Service
 Building - May 17, 1984

We take strong exception to the Union's interruption and interference with our Stores' operations. Such activities are not permitted or authorized by the Labour Relations Act. Further, by this letter, we are expressly denying representatives of the Union access or entry into our premises for such purposes. Any further attendance by Union representatives or agents to encourage or solicit Union support including attendance at meetings will be regarded as a violation of the Trespass to Property Act.

The Company, therefore, requires your Union to cease and desist from such activities immediately or the Company will take such steps as we consider appropriate. However, we trust that this will not be required.

Yours very truly

Ronald A. Hubert
Company Employee
Relations Manager

Distribution had already been made in the Store by employee committee members on the 17th of May, but in light of the company's threat to press charges under the *Trespass to Property Act*, it was decided not to proceed with the non-employee distribution in the Store. At a further meeting with counsel, it was decided to suspend distribution in the store altogether, and to send to Eaton's the following letter:

June 4, 1984

Mr. Ronald A Hubert
Company Employee Relations Manager
Eaton's
1 Dundas Street West
Toronto, Ontario
M5B 1C8

Dear Mr. Hubert:

We have your letters dated May 9 and May 18, 1984 for reply.

We deny absolutely your unsubstantiated allegations of misconduct in our organizing campaign. If there are specific examples, please provide us with details and we will investigate.

With respect to your comments as to our communications with your employees, we will continue our campaign within the limits of the law. It is our opinion that your attempted interference with our campaign may well violate the Ontario Labour Relations Act. We are not aware of any situations where the work of your staff or customer relations have been disrupted, nor where unusual housekeeping problems have been created. If there are specific examples, please provide us with details and we will investigate.

There is no question that it would not be as necessary to attend at your business premises for the purpose of communicating with your staff if we had any other means of reaching them. Please, therefore, let us know whether or not the company is prepared to provide us with a complete list of names and addresses of potential bargaining unit employees.

Yours truly,

Bert Scott, Director
Retail, Wholesale &
Department Store
Organizing Committee.

As for the series of meetings previously set for the end of May, further notice of those was passed by word of mouth, and turn-outs ranged from 40 employees downward. At this point the number of employees actually on the in-house "organizing committee" was roughly 20, and that number at one point got as high as 35-40, although the complainant notes that it was unable at any time to obtain representation from every area of the store.

9. Another general organizing meeting was set for June 26th, and it was decided to distribute the notice outside the store doors prior to store opening on June 22nd. There are two main employee entrances to the store. One is through the St. James Mews at the northwest corner of the Mall, and the other, much more popular one, is also on the north side of the

store off what is referred to as “two below” in the Mall. That entrance is at one end of the Dundas Mall lobby, in a semi-enclosed area leading to the Eaton’s store doors. At the opposite end of the Lobby is the exit from the northbound subway, and half-way across is the escalator coming down from “one below”, which contains the exit from the southbound subway. The broad entrance to the store is sealed off by a large sliding glass door, which is kept open the width of a normal doorway to permit employees and other persons having passes to enter prior to the store’s opening at 10 a.m. An Eaton’s security officer stands at the door to check passes. At about 9:30 in the morning on June 22nd, a group of the complainant’s staff organizers stood immediately outside the store door on “two below” and proceeded to distribute notices to the employees entering for work. They were shortly interrupted, however, by security personnel from Cadillac Fairview, advising them that they were on Cadillac Fairview property, and that soliciting and/or distributing leaflets was prohibited. The organizers asked the officers to show them where Cadillac Fairview property ended, and were shown outside to the street-line. Ms. Currie, one of the organizers, said that she thought they had been on Eaton’s property when they stationed themselves just outside the store door. The security spokesman (who denies this exchange) is alleged to have responded to the effect that that was indeed Cadillac Fairview property, but that they carried out the wishes of their tenants.

10. The next morning, the organizers were back at the Eaton’s Centre, handing out Union shopping bags to customers at each of the entrances to the store. Volunteers also went into the store to shop, carrying and displaying the shopping bags. At some point Eaton’s Personnel Manager, Mr. Simmonds, entered the store through the Mall entrance, and, stopping in front of Ms. Currie, whom he knew, said: “Carole, you know you’re not supposed to be doing that”. Ms. Currie said: “What?” and Mr. Simmonds responded: “Soliciting”. Ms. Currie stated that she was not soliciting, and Mr. Simmonds simply smiled and walked into the store. About five minutes later, a security officer from Cadillac Fairview appeared and told the group: “You’ll have to leave - you’re not permitted to solicit.” The distribution of shopping bags was then continued on the street outside the Centre.

11. Ms. Currie testified that it was imperative that the Union have access to the “two below” entrance for distribution in order to provide employees with information such as their legal rights to organize and notices of meetings. Ms. Currie testified that not all of the employees read the newspaper, and that the cost of newspaper advertising was prohibitive in any event. She acknowledged, however, that she herself was not aware of what the cost of advertising was in the local newspapers, or the TTC billboards, but asserted that more senior officials of the Union had made those inquiries. In the face of the threats of legal action, however, to both employees and non-employees alike, the complainant contented itself at this point with mail-outs to the limited addresses it had through memberships, with a view to having this material passed on to others. (It was apparently not until November or December that the complainant either chose or was able to begin compiling a list of additional addresses from employees’ last names and the telephone book.) One of the complainant’s July mail-outs contained the following list of in-house organizers, with telephone locals:

*YOUR Toronto Eaton Centre**

ORGANIZING COMMITTEE

YOUR TEAM LEADERS

*TEAM COORDINATORS

HARRY BOURNE 3652	5th FLOOR	LOCAL
GIUSEPPE (JOE) CARA	1 BELOW	3985

*FLOOR LEADERS

CLAIRE ZENHENKO 2917	7th FLOOR	LOCAL
JACK CHERRY	6th	2361
GIL AGNEW	5th	4114
JOHN MOFFAT	4th	3011
CLARENCE WILKINS	1 BELOW	3544
ALEX PITTIGLIO	2nd	4121
JULIA LAM	MAIN	2086
DAVID McCULLY	M1	3023
NANCY KENDREW	M2	2697
BRIAN DOTY	M3	3652

*ASSISTANTS

GEORGE BEAUREGAURD	5th	2782
LINDA POLLACK		2711
BARBARA RAMSAY		3525
PETER KAPS	5th	2782
TOM HORNE	5th	3140
JAMES RICHMOND	5th	4114
ART ESPEY	6th	2361
MARK WILSON	DISPLAY	3520
IAN FENN	DISPLAY	3520
WAYNE BRAY	DISPLAY	3520
RITA DEMELO	MAIN	
MIKE SMITH	4th	3011
CATHERINE COURBET	M2	
SANDRA STEVENS	3rd	2072
MARIA BRAGANCA	MAIN	2086
GEORGE BAKAZIAS	KITCHEN	3905
MARIE ESPEY		3905
JOE CASTAGNA	M1	3985
ALAN ARDILL		2620
MAURICE MOLELLA	FINE FOODS	
VINCE QUENET	M1	

BE A WINNER*REACH WITH DIGNITY SPEAK UNION!!!*

This prompted the following response from management:

July 24, 1984
 Mr. A. Scott
 Director
 Department Store Organizing Committee
 Retail Wholesale & Department Store Union
 Suite 102
 15 Gervais Drive
 Don Mills, Ontario
 M3C 1Y8

Dear Mr. Scott:

Last week, an undated letter bearing your name and position was addressed to Employees, Toronto Eaton Centre.

The letter identified the Toronto Eaton Centre Organizing Committee by name and telephone locals where these individuals may be contacted.

I would like to point out to you that these telephone numbers are Company business numbers and are not to be used to receive or make calls regarding union business. The employees have been so informed and you may choose to also inform them that solicitation on Company premises is not permitted.

Yours very truly,

Ronald A. Hubert
Company Employee
Relations Manager

12. Some time in the summer the complainant also began stationing its organizers outside the "two below" doors before store opening to greet employees (and maintain some visibility) as employees came to work. This occurred to some extent at closing time as well. While the evidence of Cadillac Fairview is that the Union supporters tended to greet incoming employees by forming a kind of "funnel" leading to the doors, in all of the daily reports only one incident of a Union organizer actually "obstructing" another pedestrian is recorded. The extent of pedestrian traffic in that area of the Mall at that hour came to be in dispute, and, to avoid the calling of further witnesses, the Board accepted the invitation of the parties to attend with them between 8:30 and 9:30 in the morning in order to take a view of the area. As the Board indicated at the hearing, that view confirmed the evidence of Cadillac Fairview that usage of the 2 subway entrances and the escalator was regular and heavy at that time. However, the view also confirmed the evidence of the complainant that the bulk of that traffic turns away from the Eaton's store at the base of the escalator and makes its way through other access points to its destination on the street or elsewhere in the Mall. Five or six feet from the base of the escalator in the direction of the Eaton's store doors, is a line of concrete pillars or columns, with another 30 to 40 feet of space from that line of columns to the doors themselves. With the assistance of our view, we accept the evidence of the complainant that essentially the only persons making their way across that semi-enclosed area of the Mall leading from the row of columns to the Eaton's store doors at that hour (the store operations open at 10) are persons, presumably in the main employees, on their way into the Eaton's store with their passes. The only other category of pass-holders mentioned in the evidence is Eaton's suppliers, or persons connected with the fast-food concessions in the area inside the store known as Bites 'n Nibbles.

13. In September it was decided to carry out further distributions in the Mall area, taking advantage of the distraction that would be caused by the visit of the Pope. The idea was to commence distributions outside the store doors, and then to move to the TTC doors when asked to leave. It was hoped that the TTC's pre-occupation with the Pope's visit would prevent them from paying attention to the Union's use of their premises. This was done on September 15, 16 and 17, the hand-out including notice of a general meeting called for

September 18. That meeting had a turn-out of about 50 people. Meanwhile, the presence of Union organizers outside the store doors at "two below" continued on a daily basis with the Union supporters being joined by employees of an *anti*-Union group which had sprung up, and which was referred to as "S.T.U.N." (Stop The Union Now). The S.T.U.N. group also had been distributing propaganda of its own in the store during the campaign. By the end of September, Cadillac Fairview indicates that it decided it was time to re-assert its complete control over the Mall area, and through its solicitor wrote to the complainant's solicitor the following letter of September 28th, 1984:

Re: Retail, Wholesale and Department
Store Union and Eaton Centre

As you are aware, for the past while, varying numbers of members of the Union, employees of Eaton's and the Union's professional staff, have been standing immediately adjacent to the Dundas Mall entrance to the Eaton's Store prior to the store opening and "communicating" with persons, presumably Eaton's employees, entering the store premises. In addition, at night following the Eaton's store closing, there have been groups of Union supporters "communicating" with the persons leaving the Eaton's Store at the Dundas Mall exit.

Recently, the Union group has been joined by a number of STUN supporters who likewise "communicate" with persons entering the Eaton's Store at the Dundas Mall entrance prior to the store opening.

This will confirm the telephone notification to your office on Thursday, September 27th, 1984 that our client has decided that commencing on the morning of Friday, September 28th, 1984, it will allow neither the Union supporters nor the STUN supporters to congregate or assemble in the Dundas Mall area prior to the opening of the Eaton's Store or after it closes.

The complainant's practice of stationing its organizers outside the Eaton's doors so as to be able to greet employees as they arrived at and left work was considered to be "congregating", and hence prohibited by Cadillac Fairview security from that point on.

14. Ms. Currie described the complainant's response to Cadillac Fairview's action as "angry", and on the strength of it decided to re-commence distributions both inside and outside the store. Main targets for distribution inside the store had been the two restaurants used by employees in large numbers, being the collection of fast-food outlets known as "Bites 'n Nibbles" just inside the store doors at "two below", and the large cafeteria known as the "Marine Room" on the store's sixth floor. The latter area also has a room adjacent to the main serving area known as the "Flag Room", which has been designated by Eaton's as a place to sit down and eat one's own "bag" lunch. The "Flag Room" is not restricted to Eaton's employees. There had been some earlier restaurant and in-store distributions in the summer, but these had been curtailed following receipt of the company's September 10th letter:

Mr. A. Scott
Director
Department Store Organizing Committee
Retail Wholesale & Department Store Union
Suite 102
15 Gervais Drive
Don Mills, Ontario
M3C 1Y8

Dear Mr. Scott:

On August 30th, 1984, Union supporters again engaged in the distribution of union literature on Company premises in locations such as the Marine Room, Bites and Nibbles, employee lockers and cash register desks in the Toronto Eaton Centre.

We have repeatedly asked the Union to cease from such activities. The requirement to clean up discarded leaflets and those left on tables is an added housekeeping task and an unnecessary distraction to both customers and employees. We have advised you in the past that we will not permit solicitation for union membership on Company premises.

Those employees who we are aware were involved in the process of distributing union literature on the premises were interviewed and each claimed a lack of awareness of the Company's position. They have been informed of the Company's position and that further actions of this kind will result in corrective discipline being taken.

Yours very truly,

Ronald A. Hubert
Company Employee
Relations Manager

15. On the morning of October 10th, the complainant's supporters attempted a distribution outside the store doors at "two below", but were evicted by Cadillac Fairview personnel. On the morning of October 11th, it was arranged to have non-employee organizers distribute leaflets outside the store doors at "two below", and to have an employee, Trish Willis, distribute additional leaflets to persons sitting at the tables in Bites 'n Nibbles. A reporter for the *Globe & Mail* was also present. Eaton's' evidence is that even at that hour, i.e. before store opening, Bites 'n Nibbles is used for coffee not only by employees reporting for work, but by Mall cleaners, retail suppliers and concession employees with passes, and even Eaton's management (whether to conduct informal meetings or otherwise). Ms. Willis began her distribution of leaflets, placing copies at the various tables, but was interrupted by Eaton's' Personnel Manager, Mr. Simmonds. Subsequently in the Personnel Manager's officer, Ms. Willis was politely told that such conduct was prohibited, and that she was not to do it again.

16. On October 27th, the organizers again attended in the Mall area for a distribution, this time accompanied by a City alderman, Jack Layton. Security personnel from Cadillac Fairview attended at the scene, but after a conversation with Mr. Layton, left. Eaton's itself then responded to the situation by opening its doors wider, thus spreading the stream of employees entering for work. The Union organizers continued to attend in the mornings thereafter for the purpose of saying "good morning" to employees, and upon refusing Cadillac Fairview's request to leave, were told they could stay as long as they were not distributing leaflets, or impeding traffic. The only additional development, up to the point where it was agreed to close off the evidence, was that on the morning of November 9th, the Union organizers did proceed to carry out a distribution, and refused to stop when asked by Cadillac Fairview. Cadillac Fairview took no further action to prevent them from continuing.

17. The position of Cadillac Fairview with respect to authorized use of the Mall was succinctly set out in the course of these proceedings in a letter from its counsel, Mr. McNaughton, to the complainant's counsel, Mr. Hayes:

This will confirm that T.E.C. Leaseholds Limited is the body which holds, in

one form or another, the leasehold interest in all of the land comprising the Toronto Eaton Centre Complex. Eaton's is a tenant of the property as are all of the other stores in the Centre and occupants of the various office towers. The Cadillac Fairview Corporation Limited manages the property on behalf of T.E.C. Leaseholds Limited. The latter has no day-to-day involvement in the operations. All of the day-to-day operations are carried on by The Cadillac Fairview Corporation Limited. The Cadillac Fairview Corporation Limited is the employer of the security staff in the Centre.

Cadillac Fairview maintains a general no solicitation policy in all of the shopping centres which it manages. There is no written policy as to who may or may not be allowed to solicit or distribute material or use the Toronto Eaton Centre in particular. Generally, organizations of a charitable, non-profit or public service oriented nature may be granted permission to use the Complex. In addition, other functions directly related to the commercial activities of the Complex or its tenants may be allowed.

The permitted non-commercial activities can be divided into roughly five groups. Firstly, direct solicitation such as by the Salvation Army, organizations conducting tag-days or the sale of daffodils for the Canadian Cancer Society. Secondly, the use of space by groups such as the Canadian Opera Company or the Toronto Symphony Dream Auction. Thirdly, the use of the community service booths located on Mall Level 1, adjacent to the fountain and in the South Court, from Monday to Friday, by organizations such as the City of Toronto Health Department for Health Week or Dental Week. Fourthly, the use of the South Court or Trinity Way area for public information displays by such organizations as the Ontario Ski Council, the Metropolitan Toronto and Region Conservation Authority, and the Canadian Cystic Fibrosis Foundation. Finally, by agreement with a tenant, Contemporary Research Centre Limited, the tenant may conduct on-mall surveys at specific locations and times.

All usage of the Mall is directly controlled by Cadillac Fairview. All tenants are prohibited from soliciting, canvassing or peddling in or about the Complex. Should tenants or others attempt to distribute hand bills or solicit, they will be requested to cease their solicitation or distribution or literature if observed by any of the Centre's security staff.

Usage of the Mall by persons doing filming either commercially, or on behalf of tenants is also regulated.

Requests for use of the Centre are made to the Management Office in the Centre. Generally, if the organization meets the criteria as set out above, their requests will be considered favourably. All organizations using the Community Service Booths complete a Space Agreement, acknowledge the rules and regulations as set out by Cadillac Fairview, provide proof of insurance if requested, and sign a release. All literature to be distributed must receive prior approval and be submitted at the time space is requested.

Organizations engaging in tag-days, if granted permission, may only solicit at specified locations (the main entrances) and in limited numbers (generally 2) at each entrance, for specified times and be properly identified.

Cadillac Fairview also co-ordinates the use of the Trinity Way area by performing groups or artists and the staging of fashion shows and related promotional activities.

It is estimated that there are approximately one dozen calls a week from people asking to use the Centre. Generally speaking, only one organization will be allowed to solicit at any one time on a first come first served basis.

I enclose herewith:

- (1) Toronto Eaton Centre - Special Events/Displays *Booking Form*.
- (2) Application for use of Toronto Eaton Centre, Community Information Booth with rules and regulations on the reverse side.

- (3) (i) Display space Agreement.
- (ii) Eaton Centre Display Rules and Regulations.
- (4) (i) Application for Tag Day in the Toronto Eaton Centre.
- (ii) Rules Governing Tag Days at the Toronto Eaton Centre.
- (iii) The Eaton Centre Directory.
- (5) Eaton Centre Location Fees Rate Sheet.
- (6) Releases:
 - (i) Filming.
 - (ii) Performing and/or Appearance.
 - (iii) Performing.
 - (iv) Exhibiting.

The witnesses of Cadillac Fairview explained the importance to it of maintaining tight control over the Mall because of the appeal that the Mall area has to various and sundry special-interest groups as a major centre of pedestrian traffic in the City. The exceptions they make, it was explained, are made solely on the basis of what Cadillac Fairview feels enhances the commercial purpose of the Mall, or enhances Cadillac Fairview's image in the City as a "good corporate citizen". The community service booths appear to the Board to be available to the broadest category of users, but they are located in an area divorced from main traffic patterns (especially for Eaton's employees) and the complainant has indicated no desire to avail itself of them. The Regional Manager responsible for the Mall testified, in any event, that the complainant would not have been granted permission to use these booths if it had applied. While the evidence indicates that exceptions to Cadillac Fairview's stated policy on occasion do occur in the Mall, we are not prepared to conclude in this case that these exceptions occurred with Cadillac Fairview's knowledge and approval.

18. Cadillac Fairview's witnesses testified that the manner in which they operate the Mall rests within their sole judgment alone. While a call from *any* tenant will be responded to, in terms of an officer attending at the scene, it is the officer or his Cadillac Fairview superior, they indicate, who decides whether or not to take action. Cadillac Fairview produced a summary of the many occasions from April to November that its officers either encountered Union activists outside the Eaton's store in the Mall, or were called by Eaton's management, normally through the store's Loss Prevention Officers, with respect to same. In the majority of those instances, the reports show that the security officers did no more than attend and observe the situation in question, and took no action, either because no prohibited activities were being engaged in, or because they ceased as soon as the security officers appeared. The officer's report for July 19, 1984, for example, states:

At 2105 hours, our security office received a call from Eaton's claiming that there were union representatives on the first level of Dundas Mall. I reached this location at 2113 hours and observed four gentlemen standing about twenty feet east of the Eaton's entrance. One gentleman had papers under his arm.

They were not handing out any paraphernalia. They were not impeding or obstructing traffic or coercing anyone into a conversation.

I observed the situation until 2135 hours, and by then, two of the gentlemen had left and the other two had moved farther away from the area.

The initial call was handled by S/S MacKeigan who reports that Eaton's did not inform him that the persons outside their door were in fact union activists. He actually had to ask if this was the case.

When I was at Dundas, Eaton's called on two more occasions asking why we were not removing them. I had no contact with Eaton's.

In addition, at the end of October, Cadillac Fairview testified that it made a decision not to challenge the Union organizers in any way that might create a "media event", and possibly discourage Christmas shoppers.

19. As for Eaton's own "solicitation" policy, Mr. Ron Hubert, Employee Relations Manager, gave evidence that Eaton's policy in documentary form was last revised in 1977, although not materially changed from what had existed for years, and presently states:

WORK REGULATIONS - SOLICITATION

1. BY EMPLOYEES

Solicitation or personal contributions for flowers or gifts from staff members on a special occasion is permitted within a department if approval is obtained from department management. As such appeals may be annoying or embarrassing to certain staff members, the Company expects that they will be kept to a minimum and that contributions will be solicited on a voluntary basis at all times.

Solicitation of employees for the sale of tickets, articles, etc., or circularizing employees is prohibited without the expressed authorization of department management.

2. BY NON-EMPLOYEES

The Company does not permit the solicitation of employees by non-employees on its premises, for any purpose, during working hours.

For the purpose of this statement of policy, the term "solicitation of employees" is defined to include any of the following actions by outside agents, salesmen or other persons:

- (a) selling or distributing articles of any kind
- (b) canvassing or circularizing employees
- (c) requesting or appealing for donations, contributions, memberships etc.

3. CHARITABLE

Company wide solicitation of funds for charitable purposes is limited to national campaigns, community fund drives and recognized charities and organizations.

The Company co-operates in such appeals for funds by providing opportunity for employees in many of its places of business to contribute through the Employee's Charitable Trust Fund.

Units which do not participate in the formal plan, make collections in such manner and on such occasions as are appropriate to the Unit concerned.

4. OTHER

Solicitation for any other cause or organization is not permitted except in the case of a special appeal which may be given Area personnel Management approval.

Mr. Hubert testified that the policy, although followed, has never actually been published for employees in written form. In brief, Mr. Hubert explained that its purpose is to eliminate any distractions not conducive to the store being a pleasant place for customers to shop, or to the maintenance of the employees' full attention to the customer. For that reason even charitable appeals are limited in most places to formal payroll deductions. On the evidence the Board accepts that the degree of "solicitation" which does from time to time go on within the store is generally either outside the knowledge of management or confined within small groups of willing participants, for example in a pool for the purchase of lottery tickets. Ideally Eaton's indicates that it would like to remove such contentious subjects as unionization from the selling-floors of the store entirely, but it recognizes that it is not realistic to attempt to control what employees choose to talk about in casual conversation. Whether or not any contrary impression might have been created by the generality of any of its earlier written statements, Eaton's has stated clearly on the record in these proceedings that it does not seek to control *that* kind of oral communication or solicitation anywhere in its store. And the complainant's witness, Trish Willis, freely admitted in cross-examination that such conversations have in fact been taking place in the store on a regular basis, and that she was pretty well aware of how everyone in her department (of 19) felt on the issue of unionization. Mr. Hubert testified that Eaton's' only concern is that such oral communication not become an irritant to other employees, or be allowed generally to interfere with employees carrying out their proper duties in the store. What *is* controlled is the distribution of literature in any area of the store, on the basis that it creates not only a litter problem, but can have a continuing presence in the store to the distraction or the annoyance of customers or employees alike. Mr. Hubert testified that there are no exceptions to this "no-distribution" rule, but that no precise definition of what constitutes a "distribution" has ever been formulated. For one employee to hand another a card, he testified for example, would not be a "distribution", nor would a casual exchange of literature within an informal group at coffee. As for the use of the restaurants generally, Mr. Hubert also made it clear that Eaton's has no objection to non-employee organizers using the restaurants for the purpose for which they were intended, and in the course of such use discussing the benefits of unionism, with the employee or employees whom they may have arranged to meet, or otherwise soliciting their membership. However, to transform the restaurant into a full-scale place for carrying on the business of the Union by, for example, table-hopping, or handing out literature in a general way, is strictly prohibited.

II. ARGUMENT

The Complainant

20. It is the position of the complainant trade union that the aforesaid actions of both the respondent Eaton's and the respondent Cadillac Fairview constitute unlawful interference with the rights guaranteed to employees under section 3 of the *Labour Relations Act*, and as such are continuing violations of both section 64 and 66 of the Act. Those sections provide:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employer's organization or person acting on behalf of an employer or an employer's organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

21. With respect to the respondent Eaton's and the rights of its own employees, the complainant asserts that the rights envisaged by section 3 include, *inter alia*, the right of employees "to converse with other employees regarding union organization, to solicit other employees to become union members, to attempt to persuade other employees to become union members, to sign up employee union members, and to provide employees with leaflets informative of the union campaign", in and about the workplace free of undue employer interference. Any employer interference with those rights outside of the employee's working time, therefore, is *prima facie* a violation of sections 64 and 66, and one that, on the present facts, cannot be justified by the operational needs of the employer. It is submitted that Eaton's has, in any event, denied to itself the right to insist upon a broad no-solicitation or no-distribution rule, since it has itself permitted frequent liberties with that rule in the past, with respect to activities *other than* those pertaining to the organizational campaign of a trade union.

22. With respect to the "no-solicitation" rule of Eaton's, the complainant submits that that has been applied by Eaton's prior to these proceedings in an overly broad manner, so as to recognize no distinction between working and non-working time. The complainant points to both section 71 of the Act and the decision of the Board in *Adams Mine*, [1982] OLRB Rep. Dec. 1767, as making "working" versus "non-working" time the critical distinction. The complainant further submits that the American Courts' "department-store exception" to

the freedom to solicit on *non*-working time is inappropriate to import into this jurisdiction, and has, in any event, come to be strictly confined to "customer and sales areas" of the floor, and has been held not to apply in public restaurants located within the store. The complainant similarly argues that no justification in the present case exists for Eaton's broad "no-distribution" rule, applying as it does, once again, to non-selling areas of the store, such as the restaurants, and at times when employees have not yet begun to work, or are on their break. With respect to the "Trish Willis" incident, in particular, the complainant submits that this occurred at a time when the restaurant had not yet been opened to the public, and was effectively an "employee cafeteria".

23. With respect to Eaton's and/or Cadillac Fairview and the question of *non*-employee rights, the cornerstone of the complainant's argument is that the rights contemplated by section 3 of the Act include the right to receive and have access to relevant information, and that the employee's place of work is the most natural and appropriate location for such access. Any act of the employer or his agent, therefore, which unnecessarily limits this access is in violation, once again, of sections 64 and 66 of the Act. And the Board ought to conclude, the complainant submits, that in light of the relationship present here, Cadillac Fairview, must be seen to be a "person acting on behalf of" the employer Eaton's. The complainant further submits that the distinction drawn elsewhere between "employee" and "non-employee" organizers is one without substance, and that both groups ought to be placed on the same footing when it comes to recognizing the right of employees to unobtrusive access to information on private property. The complainant accordingly urges the Board to reject the employee/non-employee distinction which the United States Supreme Court drew in *Babcock v. Wilcox*, (1956) 351 U.S. 105, as well as the Board's own *obiter* in the *Adams Mine* decision, referred to *supra*, preferring rather the simple test in *Republic Aviation*, (1944) 324 U.S. 793, being: "Does it interfere?". And, the complainant adds, even if the Board were to recognize the validity of the former distinction with respect to private "industrial" workplaces, it ought at least to reject it when dealing with a "quasi-public" setting such as a retail store and shopping mall.

24. Finally, and in the further alternative on this point, the Union argues that it has met the onus of showing that no other effective means of communicating with the employees are reasonably available, and that even on the basis of the *Babcock v. Wilcox* test itself, the complainant is entitled to the access it seeks. The complainant, in support of this, relies on a number of facts in this case, stated by it as follows:

- (i) Eatons employees live in all sections of, and in some cases, beyond the boundaries of the vast Metropolitan Toronto area;
- (ii) the majority of Eatons employees are women, many of whom would not be listed in the telephone directories;
- (iii) the majority of Eatons employees travel to work by subway and, because of the geography of the T.E.C., never set foot on public property at any location within miles of the workplace;
- (iv) the majority of Eatons employees work part-time and shift times can and do vary so that employees in some locations may rarely if ever meet;

- (v) for security reasons, Eatons management prohibits employees from attending in other departments and on floors other than their own when the store is not open to the public;
- (vi) use of internal Eatons phones for non-business purposes is prohibited;
- (vii) Eatons has chosen on occasion to communicate on union questions directly to all employees by sending letters to their homes;
- (viii) Eatons employs approximately three thousand retail sales persons at the T.E.C. eligible for union organization and more at peak periods who are spread over the many floors at the T.E.C.;
- (ix) coffee breaks are a maximum of 15 minutes in duration and taken over the course of a shift as customer demand permits; many employees do not leave their departments for such breaks;
- (x) Eatons employees most commonly take lunch breaks at in-store restaurants and are encouraged to do so by virtue of an employee discount policy;
- (xi) there are no known outside public restaurants within the T.E.C. where large groups of Eatons employees are known to congregate;
- (xii) the Union has requested and been denied a list of employee names and addresses;
- (xiii) millions of customers and tourists visit the T.E.C. every year.

25. The complainant further submits that the respondent Cadillac Fairview has a practice of permitting a broad range of soliciting activities on its mall premises, and ought not to be permitted to assert an unfettered right to decide "in its sole discretion" whether to deny such access to the trade union.

26. The complainant acknowledges that the question of access for non-employees is at least to some extent already dealt with in section 11 of the *Labour Relations Act*, but argues that that should not be taken by the Legislature to have been intended as a "complete code" on the subject. Section 11 provides:

11. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

In addition, the complainant argues that even if section 11 is to be read by the Board, as it did in *Adams Mine, supra*, as a complete code on the right of access issue, that section deals

only with access to property of the *employer*, and ought not be read as a code extending to access to the property of someone other than the employer.

27. With respect to the *Trespass to Property Act*, which provides:

2.-(1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engaged in an activity on premises when the activity is prohibited under this Act;
or

(b) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than \$1,000,

the complainant submits that Union organizers of either the employee or non-employee variety are here "acting under a right or authority conferred by law", specifically, section 3 of the *Labour Relations Act*, as confirmed by section 64 of the same Act.

28. Finally, the complainant argues that to the extent that the respondent Cadillac Fairview can find refuge in the provisions of the *Trespass to Property Act*, that Act is, by virtue of the *Canadian Charter of Rights and Freedoms*, to an extent unconstitutional, in that it places limits upon freedom of expression and of association which cannot be justified in the present context. The complainant points to the absence of an express property protection in the *Charter* as evidence of a legislative intent that fundamental freedoms, including freedom of expression and association, "occupy a preferred position over property rights in the Canadian polity". At the very least, the complainant submits, the approach of adjudicators in interpreting section 3 rights ought to be informed by the freedoms Parliament saw fit to expressly provide in the *Charter*.

29. On the basis of these submissions, the complainant seeks the following relief:

1. *Against the respondent T. Eaton Company Limited*

(a) Declaration that the respondent Eatons has violated sections 64 and 66 of the *Labour Relations Act*.

(b) Direction that the respondent Eatons cease and desist from its interference with the exercise of rights under the *Labour Relations Act* by individuals and the complainant trade union.

(c) Direction that the respondent Eatons:

(i) retract the broad no-solicitation rule contained in its letter addressed to the complainant trade union dated May 18, 1984, and repeated thereafter;

- (ii) permit lawful union activity by employees of Eatons on non-working time within Eatons store premises including the distribution of union literature;
- (iii) permit peaceful access by non-employee representatives of the complainant trade union, to public areas of Eatons premises including public restaurants and areas most proximate to normal employee entrances for the purpose of union solicitation which solicitation may include the distribution of union literature;
- (iv) distribute the standard Labour Relations Board "Notice to Employees" in the usual form to all potential bargaining unit employees or post such a notice on all employee bulletin boards in the premises of Eatons;
- (v) direction that the respondent Eatons provide to the complainant trade union a list of all potential bargaining unit employees which list shall include addresses, and where available, telephone numbers of such persons.

2. *Against the respondent The Cadillac Fairview Corporation Limited*

- (a) Declaration that the respondent has violated sections 64 and 66 of the *Labour Relations Act*.
- (b) Direction that the respondent cease and desist from interference with the exercise of rights under the *Labour Relations Act* by individuals and the complainant trade union.
- (c) Direction that the respondent permit peaceful access by persons to areas of the Eaton Centre proximate to the Eaton's store under the direction and control of the respondent for the purpose of encouraging support for the complainant union or soliciting membership in the complainant union.

30. More specifically, it was the position of the complainant union in final argument that employees on the Eaton's selling-floor must be permitted, should they so desire, to discuss matters pertaining to the trade union with one another in casual conversation as well as to distribute documents or pieces of literature one to the other, within their own small groups, whether on non-working time *or* on working time, so long as the operation of the store is not interfered with. Employees, the complainant asserts, should also have the right, on a broader scale, to make *general* distributions of literature throughout the store before store opening, as well as in the "public" eating areas of the store. With respect to *non-employees*, the complainant submits that the opportunity for professional organizers to have face-to-face contact with employees is essential to the campaign as well, and the complainant seeks the right of non-employee organizers to attend at the employee-entrance to the store, whether just inside or just outside the door. This the complainant indicates, would be for the purpose of handing out literature, or of being available to talk to any employee who so desired, as in the case of a street-corner outside the ordinary plant.

31. Apart from these remedial requests, the complainant also asks the Board to strike down its own “6-month” and “12-month” card-solicitation rules, on the ground that they are arbitrary and unjustifiable restraints on the freedom of association guaranteed by the *Charter*. In the alternative, the complainant asks that the 6-month and 12-month periods not begin to run against it until the respondents have been made to cease their unlawful interference with the complainant’s campaign.

II. Eaton’s

32. It is the position of the respondent Eaton’s that *Adams Mine, supra*, represented a deliberate and careful attempt by the Board to analyze the issue of trade union rights on company property, and now sets out the code for this jurisdiction. That “code” is summarized at paragraph 22 of the decision in the following terms:

From this analysis we arrive at the following general principles:

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer’s property are valid in the absence of an application for a direction pursuant to section 11.

Apart from section 71, Eaton’s submits, the Act is essentially silent on where the line is to be drawn between section 3 rights and the employer’s rights of property and management: *Adams Mine*, it submits, was the Board’s attempt to strike that balance. Whether in a given case a sufficient justification has been made out to rebut the normal presumptions is a question of fact, and on the facts at hand, the respondent submits, no violation of the Act has been made out.

33. Eaton’s points out, first of all, that the written “No solicitation” policy never was placed before any of the employees of the store, and that the “policy” so far as they are concerned, could only be gleaned from the manner and incidents in which it was actually applied. Eaton’s maintains that it never was meant to apply to oral solicitation in *non*-working time, and that the only requirement Eaton’s makes with respect to casual conversation during working time is that the operation of the business not be interfered with.

34. With respect to distribution of literature, however, the company takes a much stronger position. As an employer in the retail business, Eaton’s submits, it can justify a ban on distribution on its premises anywhere and at any time. In support of this argument Eaton’s points out that, apart from the litter problem, it has customers of all descriptions and beliefs, and ought not to have to run the risk of offending any of them with circulating material.

Written communication differs from oral communication, Eaton's maintains, in that it has a *permanent* element to it, and continues to speak if left in the store, in the way that a momentary oral communication does not. Eaton's points out that the case presently before the Board does not include any examples of the kind of limited-scale distribution argued for by the complainant, so that neither Eaton's nor the Board is in a position to assess the propriety of that kind of an exchange, or its apparent interference with the business. Eaton's itself, counsel points out, has yet to reach the point where it can define the outer limits of what is a "distribution", within the meaning of its "no-distribution" rule.

35. *Broad-scale distribution*, on the other hand, is a problem in Eaton's' submission even before store opening, because if it is not cleaned up, it is there to confront the customer when the store does open. In support of its submission Eaton's further points to the acknowledgment by Carole Currie in her testimony that the Union expects employees to read even the "Please take home" literature while at work, and is content with the prospect of an employee paying more attention to the literature than to a customer. This, Eaton's argues, is precisely its concern, and arises whether the literature is gotten into the employees' hands by leaving it on the sales desk, or handing it out at the store entrance, or during pre-store or break time in Bites 'n Nibbles. And the effect of the presence of such literature on the staff's performance, Eaton's submits, is much more difficult to monitor in a retail setting than in a factory. As for the customer reaction that the literature may prompt, it makes no difference to Eaton's whether the customer is *pro* or *con*: the very question of unionizing the store's employees is of a controversial and distracting nature, and the sales-floor, where customers have been invited to shop, is simply not the place for such a discussion to be prompted.

36. With respect to its public restaurants, Eaton's points out that these still are an aspect of its retail business, and maintains its right to prohibit their use for any purpose other than that for which they were intended. If employees or even non-employee organizers wish to meet and discuss unionization over lunch or coffee, Eaton's has no objection. But Eaton's is not prepared to see its clientele, be they members of the public or its own staff, subjected to any form of unsolicited overtures on behalf of the Union, whether by way of "table-hopping", or of a general distribution of literature. Unless, Eaton's submits, it can insulate its restaurant customers from this kind of activity, like any of the other 67 restaurants in the Mall area, its customers will *go* to those other restaurants. And this concern holds true even in, e.g., Bites 'n Nibbles *before* store opening, when the bulk of the customers are Eaton's own employees. Unlike the case of an isolated factory, Eaton's points out, there are a plethora of restaurants in the immediate area available for the employees' use, and the provision of an "employee cafeteria" is unnecessary: if Eaton's could not operate the restaurants that it does as additional "profit-centres" for the store, it would have no reason to operate them at all. Finally, on this point, Eaton's points out that restaurants such as Bites 'n Nibbles are frequented by managers as well, and that this therefore is an inappropriate place to be putting employees on the spot by thrusting a piece of literature in their hand.

37. In support of its position, Eaton's, like the complainant, draws the Board's attention to a number of Canadian and American cases, which will be analyzed in detail below. Also like the complainant, however, Eaton's cautions the Board as to the inappropriateness of the American jurisprudence as a whole, with its different legal foundations from the present jurisdiction, and points to them only to the extent they may suggest common-sense approaches to specific problems now before the Board. As with *Adams Mine*, *supra*, and section 11 of the Act, Eaton's submits that the leading American case of *N.L.R.B. v. Babcock & Wilcox*,

(1956) 351 U.S. 556, represents a sensible balance between the rights of property-owners and the rights of employees to organize, drawing the line between employee and non-employee organizers. The normal "interference with business" tests, Eaton's submits, as in *Republic Aviation v. N.L.R.B.*, (1944) 324 U.S. 793, is based on an employer's ability as *manager* to control the conduct of his employees by way of discipline, whereas no such control exists between the property-owner and a "stranger". Beyond that, Eaton's points to the fundamental differences in the American and Ontario legal approaches to "employer free speech" and to "votes in every case" as a possible basis for, if anything, a broader approach to access being taken in the United States than in this jurisdiction. And finally, even if the Board *were* to adopt the America position, Eaton's submits that the complainant has failed to discharge the onus under U.S. cases like *Babcock & Wilcox* and *Sabine Towing*, (1979) 101 L.R.R.M. 2956, of demonstrating that no other reasonable means exist for making effective contact with the Eaton's employees at T.E.C..

38. In support of this last submission, Eaton's points to a number of facts before the Board, such as the number of employees already signed up, and for whom the complainant has names and addresses through which it can, and has, circulated its written message. In addition Eaton's cites the numbers, up to 500, in attendance at meetings in March and April of last year, the number of active organizers working openly on the "organizing committee" throughout the store, the regular and free discussion of Union "pro's" and "con's" in the store testified to by Trish Willis, the complainant's failure generally to set up meetings since the ones held in the spring, and its failure to utilize available methods of media advertising, as the evidence shows the complainant did in Winnipeg, to that end. Eaton's further points to the complainant's belated attempts as of November or December to compile lists of names and telephone numbers as evidence either of the complainant's lack of effort, or of the lack of interest on the part of employees, after the initial spurt, of carrying on further discussions with the complainant. By the fall, Eaton's argues, the bloom was clearly off the rose, and the "bandwagon" effect caused by some of the complainant's early successes, particularly at Bramalea, had run its course. In short, Eaton's makes the point that it is not the problems of "access" urged upon the Board in this complaint which account for the complainant's present lack of momentum in attempting to organize the employees of the T.E.C..

39. With respect to the alleged impact of the *Charter of Rights*, Eaton's submits that the complainant's argument in any of its forms requires the Board to find that the section 2 "freedoms" override the *Trespass to Property Act*, and no authority presently exists for the Board to make such a ruling. And in any event, the source of the proprietary rights here involved is not the *Trespass to Property Act*, but the common law, and the prevalent view of commentators is that the *Charter* has no application to *private* rights at common-law (*Canada Act 1982 Annotated*, Carswell 1982; Swinton, *Application of the Canadian Charter of Rights and Freedoms*; Whyte, *The Charter of Rights and Discrimination in the Private Sector*). Eaton's also argues that the Board is not a "court of competent jurisdiction", within the meaning of section 24 of the *Charter*, and accordingly has no jurisdiction to apply the *Charter* in any event. Further, Eaton's argues, the present weight of judicial opinion would not give to the "freedom of association" in section 2 so expansive a meaning as to encompass the question of "means" at issue here. And finally, section 1 of the *Charter* in any event would require the kind of balancing that has already been done in this jurisdiction, and Eaton's submits that, on the facts, any limits which it has placed on its employees' "freedom of association" are reasonable and justifiable.

Cadillac Fairview

40. The respondent Cadillac Fairview denies, as does Eaton's, that Cadillac Fairview is a "person acting on behalf of" Eaton's. Cadillac Fairview asserts that it has its own commercial interest to guide it in its management of the Mall, and it has a non-discriminatory policy of permitting only those uses which, in its own view, are consistent with that interest. Cadillac Fairview points out that Eaton's is no more than a minority shareholder in T.E.C. Leaseholds Limited (the "landlord") and submits that it is, from Cadillac Fairview's point of view, "just another tenant". As evidence of the fact that Cadillac Fairview ultimately exercises its own independent judgment, Cadillac Fairview points to the fact that it does not always choose to take action against Union supporters when summoned by Eaton's, and that it decided from late October on to no longer challenge the Union in its activities.

41. Cadillac Fairview explains its allowances granted to charitable or community organizations on the basis that they are not repetitive in the way the Union seeks, and that they are the type of non-profit activities which enhance its image as a "good corporate citizen". But, Cadillac Fairview emphasizes, under the present state of the law, as expressed by *R. v. Peters* (1970) 16 D.L.R. (3d) 143 (C.A.); 17 D.L.R. (3d) 128 (S.C.0), and *Harrison v. Carswell*, (1975) 62 D.L.R. (3d) 68 (S.C.C.), it is not required to demonstrate the reasonableness of this distinction: its property is its to do with as it feels its interest dictates. Cadillac Fairview points out that it is not even the "employer", against whom a section 11 access order might run, and submits that it surely ought not to be placed in a *worse* position with respect to the right to control its property than the actual *employer* of the employees in question would be. Cadillac Fairview points out that the majority in *Harrison* felt it was not the role of the *Supreme Court of Canada* to carry out the kind of social balancing necessary to compromise age-old common-law property rights, and that the Ontario Legislature, as well, rejected just such an amendment to the *Trespass to Property Act* as recently as 1980.

42. With respect to the *Charter*, the respondent Cadillac Fairview provided the Board with a good deal of material discussing it, but in general terms agreed with all of the positions put forward by the respondent Eaton's. Cadillac Fairview also noted that a number of cases are now making their way to the Supreme Court of Canada, and that Canadians in general are anxiously looking to that Court for further guidance as to the scope and application of the recently-proclaimed *Charter*.

III. DECISION

43. It might be noted at the outset, that even after the attention which the complainant's activities at the Eaton Centre garnered in the media, and the company's own mailings to its employees about the union campaign in general, the complainant's chief witness and organizer, Carol Currie, clung steadfastly to her claim that not all of the employees at the Eaton Centre would have been aware of the complainant's interest in organizing them. In light as well of the kind of on-going floor discussion testified to by Trish Willis, that view is difficult to accept. On the other hand, the Board does not intend to base its decision on conjecture as to why the complainant's organizing campaign has not been more successful to date. Either the complainant is entitled to the access rights it seeks or it is not, although in making that assessment

in this case, to the extent that commercial and property rights of others are necessarily being encroached upon, the extent to which the normal means of communication have been available is clearly not irrelevant. Indeed, it is the impracticability or unavailability of the "normal" means of solicitation which underlies the complainant's major claims in these proceedings. Dealing, then, with the parties' various submissions, we will deal first with the complainant's argument on the *Charter*, recognizing that the complainant faces a number of significant hurdles in relying upon the *Charter* for the relief it seeks in this complaint.

44. Of the arguments made by the respondents, the least compelling is the suggestion that the Board does not have the power to grant relief at all on the basis of the *Charter*, because it is not, in the language of section 24 of the *Charter*, a "court of competent jurisdiction". Notwithstanding section 24, section 52(1) provides:

"52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

And section 32(1) provides:

"32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

It is difficult, therefore, to see how the Board or any other agency could ignore the various provisions of the *Charter* when called upon to apply or otherwise consider the effect of any piece of legislation in the ordinary course of its jurisdiction. See, e.g., the views already expressed on this point by the Board in *Third Dimension Manufacturing*, [1983] OLRB Rep. Feb. 261. This view would appear to have been confirmed by the Supreme Court of Canada in its recently-released decision on Alberta's *Lord's Day Act* (*Big M Drug Mart Ltd.*, judgment rendered April 24, 1985), where, at page 83, the Chief Justice wrote:

"If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Charter*, s.52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer 'of force or effect'."

[emphasis added]

The failure to repeat the words 'or tribunal' in line 5 would not appear to have been deliberate.

45. There is, however, a real question at this time as to how broadly the section 2 guarantee of "freedom of association", in particular, is to be interpreted. In *Broadway Manor Nursing Home*, (1983), 4 D.L.R. (4th) 231, 44 O.R. (2d) 392, the Ontario Divisional Court decided that to be meaningful, the "freedom of association" guarantee must be read as extending to a guarantee of the right to collectively bargain, and of the ability to strike to enforce that right. That view was roundly rejected by the British Columbia Court of Appeal

(the Ontario Court of Appeal chose to express no opinion on it in reversing *Broadway Manor* on other grounds) in *Dolphin Delivery Ltd.* (1984) 10 D.L.R. (4th) 198, and again by the Federal Court of Appeal in *Public Service Alliance of Canada* (1984), 11 D.L.R. (4th) 387. The Court in the latter case wrote, at page 391:

“The appellant relied heavily on the ‘living tree’ metaphor (*Re Section 24 of the B.N.A. Act*; *Edwards v. A.-G. Can.*, [1930] 1 D.L.R. 98 at pp. 106-7, [1930] A.C. 124 at p. 136, [1929] 3 W.W.R. 479) in arguing that the Charter, being a constitutional document, ought to be interpreted more liberally than a statute. I do not question the validity of the thesis and have no doubt that over the years many words and terms used in the Charter will come to embrace ideas not likely to have actually been in the minds of its authors. Perhaps ‘association’ will be among them. However, even the liveliest of living trees takes time to grow - it is a tree, not a weed - and I am not persuaded that the growth during two years can reasonably sustain an interpretation of ‘association’ in any but its ordinary, everyday meaning in 1982, which is, I am confident, precisely what its authors intended. It means the same today.

The right of freedom of association guaranteed by the Charter is the right to enter into consensual arrangements. It protects neither the objects of the association nor the means of attaining those objects.”

It might be noted, however, that the Trial Judge, who also found the restraint legislation at issue in that case to be valid, observed:

“In my view the clause ‘freedom of association’ guarantees to trade unions the right to join together, to pool economic resources, *to solicit other members*, to choose their own internal organizational structures, to advocate to their employees and the public at large their views and *not to suffer any prejudice or coercion by the employer or State* because of such union activities. But it does not include the economic right to strike.”

(emphasis added)

About that, Mahoney, J. in the Court of Appeal simply noted:

“I do not think it desirable to attempt to catalogue the rights and immunities inherent in a trade union’s guaranteed freedom of association.”

Leave to appeal to the *Supreme Court of Canada* has been granted in both the *Dolphin Delivery* and *Public Service Alliance of Canada* cases.

46. An even larger hurdle for the complainant, however, as *Harrison v. Carswell*, *supra*, and discussed *infra*, makes clear, is that the property rights which the respondents here seek to assert against the collective-bargaining rights of the complainant are the rights of one private citizen against another, deriving not simply from the *Trespass to Property Act*, but from “ancient” common-law principles as well. While commentators in general have expressed doubt as to whether the *Charter*, in light of section 32, can be said to apply to wholly *private* rights, Professor Peter Hogg, in his *Canada Act 1982 Annotated*, Carswell 1982, is less equivocal (page 76):

“Private activity is not covered by the Charter. Such actions as an employer restricting an employee’s freedom of speech or assembly, a parent restricting mobility of a child, or a landlord discriminating on the basis of race in his selection of tenants, cannot be breaches of the Charter, because in no case is there any action by the Parliament or government of Canada or by the Legislature or government of a province. (Accord, Testimony of

Mr. F. J. E. Jordan, Senior Counsel, Public Law, federal department of Justice, in *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, First Session of Thirty-second Parliament, 1980-81, p. 49:47 (January 30, 1981).) ... The exclusion of private activity is not only clear from s. 32, it is the result one would expect: one would expect a constitution to empower and regulate the institutions of government, not the relationships between private individuals or organizations. Indeed, the application of the Charter to private activity would create a vast new body of constitutionally-based tort law, because the Charter's enforcement provision (s. 24) would authorize lawsuits for redress of private infringements of the civil liberties specified in the Charter. That would be a strange new branch of constitutional law. (In the United States the Bill of Rights has been held inapplicable to private action; 'state action' must be present before the bill of rights can be invoked: Tribe, *American Constitutional Law* (1978), ch. 18.)"

47. Apart from this, the fact that the *Charter* identifies and affirms certain constitutional rights does not deny the existence of other rights, nor does it solve the problem of precisely how to reconcile opposing sets of rights when the differing interests of private citizens place them in conflict. Section 26 of the *Charter* states:

"26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

And, as the Chief Justice of the Supreme Court of Canada observed in an April 25, 1985 address to the Princeton Alumni Association:

"... of course, even the most generous of constitutions cannot guarantee unlimited enjoyment of the rights it proclaims. The rights of one citizen will inevitably clash with those of his or her neighbour."

In *Re N. B. Broadcasting Co. Ltd.* (1984) 13 D.L.R. (4th) 77, with respect to "freedom of speech" for example, the Federal Court of Appeal wrote:

"The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so."

48. Estey, J., in *The Law Society of Upper Canada v. Joel Skapinker*, [1984] 1 S.C.R. 357, at page 383 wrote:

"The development of the *Charter*, as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken."

Given the lack of judicial authority to date for the proposition that the *Charter* applies to private rights between citizens, we are of the view at this time, as was the Supreme Court of the United States in *Hudgens v. NLRB*, (1976) 424 U.S. 507, that the balancing of interests implicit in issues of this kind are to be carried out, not under the provisions of the Constitution, but of the *Labour Relations Act*, and the principles developed thereunder.

49. While the present case requires the Board to examine the protections afforded organizing activity by the *Labour Relations Act* to an extent not hitherto before it, it should be noted, as the parties did, that the Board was called upon to consider much of this area in the relatively recent case of *Adams Mine*, reported [1982] OLRB Rep. Dec. 1767. The focus of the Board's examination in that case was the outer limits of what constitutes

“protected activity” under the Act, but in the course of that examination the Board was called upon to carry out an extensive review of the law with respect to organizing versus property and commercial rights, as that law exists in both this and other jurisdictions. Having done so, the Board, as noted earlier, summed up its conclusions in the following significant paragraph (22) of the decision:

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer's property are valid in the absence of an application for a direction pursuant to section 11.

The respondent Eaton's, while seeking to draw some distinction between no-solicitation and no-distribution rules, essentially accepts this statement in *Adams Mines* as a “code” of the law in this jurisdiction. The complainant, on the other hand, offers full support for the “law” set forth in *Adams Mine* as it pertains to *employee* rights, but strongly urges the view that *Adams Mine* is wrong with respect to *non-employee* rights, and being simply *obiter* in the case then before the Board, ought not to be followed. On the strength of the various authorities placed before the Board in both that and this case, however, it is not difficult to see how the Board arrived at the statement that it did.

50. Dealing first with the American case law, one finds in the earliest discussions of the *Wagner Act* a recognition of the legitimacy of both the right of employees to self-organize and the right of employers to manage their business and property. In *National Labour Relations Board v. Jones & Laughlin Steel* (1936), 301 U.S. 1, for example, the Supreme Court of the United States observed:

“Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. ... Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, ‘instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.’”

[emphasis added]

51. In *Republic Aviation Corp. v. N.L.R.B.*, (1944) 324 U.S. 793, an employee, after being warned of a rule prohibiting the solicitation of, *inter alia*, Union membership in the plant, had persisted in passing out Union application cards to employees on his own time during lunch periods. The employee was discharged for infraction of the rule and, as the

National Labour Relations Board found, without discrimination on the part of the employer toward union activity. The comparable provisions of the *National Labour Relations Act* provided:

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7...

The National Labour Relations Board determined that the promulgation and enforcement of so broad a “no solicitation” rule violated section 8 of the Act in that it was an unlawful restraint upon the rights set forth in section 7. The Circuit Court of Appeal agreed, and noted with respect to both this and the related case on appeal before it:

“These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, *these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee.* Opportunity to organize and proper discipline are both essential elements in a balanced society.

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a ‘rigid scheme of remedies’ is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation.”

[emphasis added]

In the related case, *Le Tourneau*, the court also found a general rule invalid which had the effect of prohibiting the circulation of Union literature by the company’s own employees, on their own time, on parking lots owned by the company and adjacent to the plant.

52. The National Labour Relations Board then took the *Le Tourneau* principle one step further (*N.L.R.B. v. Babcock & Wilcox* (1956), 351 U.S. 105). In three cases essentially involving situations where the normal modes of Union contact with employees were not available due to the location of plants within the boundaries of private parking lots or driveways, the Board accepted the report of one of its Trial Examiners that opined:

“To differentiate between employees soliciting on behalf of the Union and non-employee Union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation.”

The Circuit Court of Appeals did not agree. It began by repeating the need to balance the competing rights and interests at play, in language which has served as the watchword for addressing this problem ever since:

“This is not a problem of always open or always closed doors for union

organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.*"

[emphasis added]

The Court also went on to note:

"In these present cases the Board has set out the facts that support its conclusions as to the necessity for allowing nonemployee union organizers to distribute union literature on the company's property. In essence they are that nonemployee union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees. The force of this position in respect to employees isolated from normal contacts has been recognized by this Court and by others. See *Republic Aviation Corporation* ..."

but observed:

"Here the Board failed to make a distinction between rules of law applicable to employees and those applicable to non-employees.

The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793, 803. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."

The Court then concluded:

"No such conditions are shown in these records."

53. *Babcock & Wilcox* has had the effect of denying non-employee organizers access to even the peripheral areas of an employer's premises other than in the most exceptional of circumstances (in fact comparable to our own section 11 requirement). The foundation for the distinction appears to be the concept of "non-employee organizer as trespasser", as the various commentators vilifying the distinction have pointed out. See. e.g. Gresham, "Still as Stranger" (1983) 62 Texas L. Rev. 111; Korn, "Property Rights and Job Security", (1984) 34 Yale L. J. 374. The distinction becomes less obvious, however, when one is comparing non-employees to employees who are off-shift, with respect to their right to be present in the peripheral areas, such as parking lots, of an employer's operation. Indeed, the efforts of the National Labour Relations Board to narrow the impact of *Babcock & Wilcox* are readily apparent. In *Solo Cup Co.*, (1968) 172 N.L.R.B. 1110, the majority of employees drove to work and parked in a private parking lot encompassing the plant. Because of heavy traffic congestion, distribution of literature on the adjacent public road was ineffective and unsafe. The union claimed that alternate methods of imparting information - off-plant meetings, home visits and mass media - were inadequate. The facts, nonetheless, seemed to fall squarely within the situation considered by the Supreme Court in *Babcock & Wilcox*, and appeared to call for

the same result. The Board, however, introduced the “big city rule”, and granted the union non-employee access. *Babcock*, it said, was distinguishable as having involved a relatively small and more easily accessible urban area. “Unlike the small-town situation existing in *Babcock*”, it observed at page 1110, “employees [here] live in various areas of Chicago [and] the surrounding towns”. The Supreme Court, drawing again upon the onus established in *Babcock & Wilcox*, refused to enforce the access order (422 F. 2d 1149). More recently, in *Ameron Automotive Centres*, (1982) 265 N.L.R.B. No. 58, the dissenting Chairman accused the Board of adopting a “suburban” or “rural” rule, in granting access to a union on the basis that the employees working in a rural area would live sufficiently far apart that normal efforts to communicate with them at their homes would prove ineffectual. The Courts have yet to pass on that one.

54. Through it all, *Babcock & Wilcox* continues to be the law, and the American courts, for their part, have left no doubt that the onus they had intended to impose upon trade unions seeking non-employee access was a substantial one. In the case of *Sabine Towing* for example, (1979) 101 LRRM 2956, the Court of Appeals stated, at 2957:

“While *Babcock* indicates that an employer may not always bar nonemployee organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer’s access rules discriminate against union solicitation. That the burden imposed on the Union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.”

55. With respect to *employee* rights, once again, the American law is as set out in *Republic Aviation*, *supra*, which wholly adopted the approach articulated by the National Labour Relations Board, in language similar to that summarized by this Board in *Adams Mine*, *supra*, in the case of *Peyton Packing Company*, 49 N.L.R.B. at 843-44:

“The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.”

An exception to this approach in the United States has been the “department store” cases, where a special rule developed prohibiting Union solicitation of any kind *even on an employee’s own time*, anywhere on or in proximity to “the selling floor”. The basis for this exception was the potential for disruption of the customer-salesperson relationship in the context of an open department-store setting. See, for example, *May Department Stores Limited*, (1944) 59 N.L.R.B. 976, at page 981. Recognizing that this is an exception to the general rule regarding employees’ own time, the National Labor Relations Board has taken care to note that the exception is in fact concerned with the “selling floor” areas of the store, although finding as well, in *Marshall Field & Company*, (1952) 98 N.L.R.B. 88 at 92, that:

“... the prohibition of union solicitation by either employee or nonemployee organizers in aisles, corridors, elevators, escalators, and stairways inside the store did *not* violate the Act. While such areas are not devoted to selling purposes, it is patent that solicitation carried on in such limited space may create traffic and safety hazards tending to disrupt and interfere with Respondent’s business to a serious degree.”

We note, once again, that the Board is not urged by the respondent Eaton’s to adopt the U.S. “department store” exception, although its submissions with respect to the distribution of *literature* do come close in that regard.

56. The same balancing process evidenced throughout the American jurisprudence can be seen in the cases of our own Board as well. As the Board in *Adams Mine*, *supra*, put it, at paragraph 18:

“The approach of the statute and this Board has been to create a meaningful balance between the statutory rights of employees and the proprietary and commercial interests of employers.”

Section 71 of the *Labour Relations Act* is reflective of this balance in providing the following qualification to the section 3 declaration:

Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.”

Elaborating on this, the Board in *Adams Mine* observed, again at paragraph 18:

“It has been noted that the workplace is the one location where employees are brought together on a daily basis; where they share common interests; and where they traditionally seek to persuade fellow workers in matters affecting their status as employees and as union members. *Gale Products* (1963), 53 LRRM 1242 at 1243 (NLRB); *N.L.R.B. v. Magnavox Company* (1974), 85 LRRM 2475 (USSC).

The workplace is therefore the most effective location for ‘union activity’ to be carried out. A policy denying this forum to employees would obviously impair the effective exercise of statutory rights, particularly the right of self-organization. On the other hand, company premises constitute private property and are established for the primary and important purpose of carrying on business activity. The above sections give some indication how the statute has attempted to balance these legitimate interests. Two lawful activities clearly contemplated within the scope of section 3 are the organization of a trade union and collective bargaining.”

And further:

“Because the workplace is a most appropriate theatre for membership solicitation, it has been considered reasonable and fair to construe break and lunch periods as non-working time belonging to employees to use as they see fit so long as they do not engage in disorderly conduct or adversely affect other legitimate business interests of the employer. Where they decide to use this time to engage in protected trade union activity, this statute and the remedies available under it apply. *To this extent, property rights have been encroached upon by the statute.* And while this is a factual issue in any particular case, union solicitation during non-working time will not generally interfere with the employer’s legitimate management interests. Any interference must be real and constitute more than a minor annoyance or inconvenience.”

[emphasis added]

57. In one of the Board’s earlier cases, *Audio Transformer Company Limited*, [1969]

OLRB Rep. Nov. 994, an employee supporter of the Union was discharged for violating an express company rule against union solicitation on company premises. The company did not establish that the solicitation was carried out on anything but the employee's own time. The Board wrote:

"If a person has certain rights under section 3 of the Act, these rights cannot be unreasonably restricted by an employer. The fact that the respondent has given prior notice in writing of its intention to do so does not enhance the respondent's position nor does such prior notice give it the right to contravene section 3 of the Act.

For the purposes of Labour Relations an employer's right to make rules as to conduct on the employer's premises is restricted only by the terms of the *Labour Relations Act* or the terms of a subsisting collective agreement. A person's freedoms which are created by section 3 of the Act must, of course, be considered in the light of the rights of others. Section 3 does not create an absolute freedom to engage in union activities at any time or place. If it had been established that Mrs. Keller was materially interfering with plant safety or was destroying company property or was creating a serious disturbance or obstruction while engaging in union activity on company premises before the commencement of her shift, the company would have the right to prevent such interference, disturbance, obstruction or destruction. If, by taking reasonable steps to prevent such unwarranted activity, the company had incidentally stopped her union activity the company could not be said to be contravening the Act."

Similarly, in *Barbara Jarvis v. Associated Medical Services Incorporated*, (1961) 61 CLLC 16,218, at page 980:

"Having regard to the provisions of the Act read as a whole, I am of opinion that organization of a trade union and collective bargaining are two of the activities which are contemplated as coming within the scope of section 3 and that freedom to participate in these activities is among the 'rights' dealt with by section 50 [now 66] of the Act. The last-mentioned section forbids an employer to 'refuse ... to continue to employ a person ... because the person was or is a member of a trade union or was or is exercising any other rights under [the] Act'. An employer who discharges a person for infraction of a 'plant rule' which forbids an employee to exercise his rights under the Act is therefore acting in violation of section 50 of the Act. This conclusion does not mean that an employer has been deprived by the legislation of authority to maintain order on his premises and to ensure that productivity will not suffer. If the primary and *bona fide* purpose of any rule he establishes with regard to activity on his premises outside of working hours or of a kind not covered by section 53 is in furtherance of the objectives just mentioned or like objectives, no exception can be taken to the rule, even though an incidental effect of the rule may be to curtail the opportunity a person in his employ has to exercise his rights under the Act."

58. In other Canadian Boards as well, the approach has been the same. In *Bell Canada*, an unreported letter decision of the Canada Labour Relations Board dated August 22, 1975, the Board stated:

"Section 110(1) of the *Canada Labour Code* guarantees to employees the right to join the trade union of their choice and 'to participate in its lawful activities'. The basic freedoms thus protected include the right to distribute or otherwise disseminate and receive information about a trade union and its activities and the right to sign a membership card, provided these activities do not take place during the working hours of the employees involved. An employer may not without compelling business reasons, prohibit employees from exercising these rights on company premises. To do so amounts to behaviour that is prohibited by the provisions of Sections 184(1)(a) and 184(3)(b) of the *Canada Labour Code*."

And the Nova Scotia Labour Relations Board, in *Michelin Tires (Canada) Limited* (1979), 79 CLLC 16,190, at pages 371-72, observed:

"Like the Canada Labour Relations Board, this Board finds that an employee's right to engage in trade union activities is interfered with unless the employer has compelling business reasons for prohibiting solicitation for membership in or support for a union other than during working hours. In our opinion there is no compelling business reason why Michelin's employees should not be allowed to solicit on behalf of the Union, if they and the employees with whom they are dealing are on their own time ..."

The Nova Scotia Court of Appeal was ultimately to vacate an injunction granted by the High Court against the employer, but on the ground that it sought by its terms to restrain the employer from interfering with access by *non*-employees to its plant. See *Michelin Tires*, (1979) 107 (D.L.R. 3(d) 661.

59. And in *American Airlines Incorporated*, [1981] Can. LRBR 90, the Canada Labour Relations Board stated at page 103:

"Employees joining a union are doing so to better their interests as workers. The union organizing will naturally take place at or around the working place. However, it must do so without causing disruption in the operation of the business and Section 185(d) of the Code so indicates."

60. In the *Canadian Imperial Bank of Commerce* case, Board File Nos. 745-1839 and 745-1870, a decision released March 5, 1985 and not yet reported, the Canada Board was called upon to apply the "balance" to a number of factual issues. The Code's version of our section 71 is cast in the form of an "offence" section, and reads:

"185. No trade union and no person acting on behalf of a trade union shall

• • •

(d) except with the consent of the employer of an employee, attempt, at an employee's place of employment during the working hours of the employee, to persuade the employee to become, to refrain from becoming or to cease to be a member of a trade union;..."

The Board found that the *Union* had violated the Code by directing mail to employees in a manner which the Board found was calculated to reach them during working hours. The Board also found, however, that the Union did have the right to have literature left on the desks and chairs of employees *before* the commencement of working hours. The Board wrote, at page 24:

"In our view, we find very little difference in this matter of solicitation and one where an employee stands outside the place of work and hands out union material. In both cases the solicitation is done outside working hours. In both cases, the Bank can exercise its managerial authority during working hours to ensure that employees are working rather than discussing the union or the literature it distributed during non-working hours."

61. In the *Ottawa-Carleton Regional Transit Commission* case, [1985] 7 CLRBR 137, the Canada Board had to decide on the legality of a rule prohibiting campaigning between supporters of competing trade unions on company premises *at all*, as well as the wearing of small-sized badges indicating support for one of the two rival unions. The Board summarized management's justification for its action in the following way at page 154:

"The Board heard evidence from several management persons describing the

impact of the [previous] campaign. In management's view, there were several disturbing factors that inhibited its ability to conduct its business in an efficient manner. The most obvious were the constant tensions and verbal exchanges between the opposing factions and the resulting peer pressure upon those who were content to take a neutral or less active role. Drivers purportedly showed up late for their assignments because of the vigorous exchanges and the overall atmosphere affected morale and created negative attitudes that reflected in the daily contact between the drivers and the public. While the wearing of badges was not significant, their very presence could be enough to encourage confrontation."

After making reference to the conclusions of this Board generally in *Adams Mine*, *supra*, the Canada Board went on to say:

"In any situation where freedoms are being exercised in a democratic society, there is a price to pay. Parliament has ordained collective bargaining to be an important fibre in the structure of our society and we have all felt the impact and inconvenience of strikes or lock-outs. We patiently, and sometimes not so patiently, make do with the knowledge and acceptance that someone is exercising their rights in a free society. So it is for an employer whose employees decide to change bargaining agents. That exercise is, as a rule, emotional, volatile and, for some, very disturbing and highly traumatic. Any incidental inconvenience for an employer must be weighed against the right of employees to select and belong to a trade union of their choice. To use Chairman Adam's words in the *Adams Mine* case, speaking of employee solicitation during non-working time interfering with an employer's legitimate management interests, "Any interference must be real and constitute more than a minor annoyance or inconvenience". In the circumstances before us, OC Transpo's managerial prerogatives could be adequately protected through the normal discipline processes."

62. This more liberal approach to organizing rights has, however, as in the United States, been confined to the activities of *employee* organizers while attending at the premises of their employer. The law has been far less generous in making accommodations for the rights of *non-employees* with respect to this same property. In our own jurisdiction, section 11 of the *Labour Relations Act*, as noted earlier, provides:

"Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union."

About this *Adams Mine* had the following to say, at paragraph 21:

"It is to be noted that the statute provides a more specific and different balance between an employer's property interest and the right of non-employees to solicit union membership from employees on company property. In this regard, section 11 provides that where employees of an employer reside on the property of the employer, the employer when directed by the Board, shall allow a representative of a trade union access to the property for the purpose of attempting to persuade the employees to join the trade union. . . . If employees have the right to carry on organizing activity on company premises, it does not seem an unfair balance of interests to limit strangers to the usual channels of communication with those employees off company premises."

[emphasis added]

Underlying this more conservative approach, appears once again to be the concept of the "non-employee organizer as trespasser". Whether such a concept is applicable to the same degree in the context of a shopping mall to which the public at large is invited is a question which

it is not unreasonable for the complainant herein to ask. It must be recognized, however, that that question was to a considerable extent placed before the Supreme Court of Canada most recently in *Harrison v. Carswell*, (1975) 62 D.L.R. (3d) 68, and, apart from a strident dissent written by then Chief Justice Laskin, was essentially decided against the position advanced by organized labour in this jurisdiction.

63. In the *Harrison* case, a group of employees on lawful strike were engaged in picketing activity in front of the premises of their employer, carrying placards and distributing leaflets. Because their employer was a tenant in a shopping mall, they were forced to place themselves on privately-owned portions of the mall itself, in order to be in an area proximate to the object of their picketing. The employees were charged with trespass and convicted under the *Petty Trespass Act* of Manitoba, an Act similar to our own, but the Manitoba Court of Appeal set the convictions aside. On appeal to the Supreme Court of Canada, Chief Justice Laskin wrote for the minority:

"An ancient legal concept, trespass, is urged here in all its pristine force by a shopping centre owner in respect of areas of the shopping centre which have been opened by him to public use, and necessarily so because of the commercial character of the enterprise based on tenancies by operators of a variety of business. To say in such circumstances that the shopping centre owner may, at his whim, order any member of the public out of the shopping centre on penalty or liability for trespass if he refuses to leave, does not make sense if there is no proper reason in that member's conduct or activity to justify the order to leave.

Trespass in its civil law sense, and in its penal sense too, connotes unjustified invasion of another's possession. Where a dwelling-house is concerned, the privacy associated with that kind of land-holding makes any unjustified or unprivileged entry a trespass, technically so even if no damage occurs...

The considerations which underlie the protection of private residences cannot apply to the same degree to a shopping centre in respect of its parking areas, roads and sidewalks. Those amenities are closer in character to public roads and sidewalks than to a private dwelling. All that can be urged from a theoretical point of view to assimilate them to private dwellings is to urge that if property is privately owned, no matter the use to which it is put, trespass is as appropriate in the one case as in the other and it does not matter that possession, the invasion of which is basic to trespass, is recognizable in the one case but not in the other. There is here, on this assimilation, a legal injury albeit no actual injury. This is a use of theory which does not square with economic or social fact under the circumstances of the present case.

What does a shopping centre owner protect, for what invaded interest of his does he seek vindication in ousting members of the public from sidewalks and roadways and parking areas in the shopping centre? There is no challenge to his title and none to his possession nor to his privacy when members of the public use those amenities. Should he be allowed to choose what members of the public come into those areas when they have been opened to all without discrimination...

The shopping centre owner has no overriding or even coequal interest to serve in intervening in the labour dispute, and, if anything, is acting as surrogate of the struck tenant in a situation where the latter has not and probably could not claim redress or relief."

The majority, however, found the case to be governed by the principles recently decided by it in *R. v. Peters* (1971), 17 D.L.R. (3d) 128, and upheld the conviction. Dickson, J., as he then was, wrote for the majority, beginning at page 82:

"The submission that this Court should weigh and determine the respective values

to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian Constitution. . .

Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law. The Legislature of Manitoba has declared in the *Petty Trespasses Act* that any person who trespasses upon land, the property of another, upon or through which he has been requested by the owner not to enter, is guilty of an offence. If there is to be any change in this statute law, if A is to be given the right to enter and remain on the land and B against the will of B, it would seem to me that such a change must be made by the enacting institution, the Legislature, which is representative of the people and assigned to manifest the political will, and not by this Court."

64. The majority in *Harrison* also noted, at page 83:

"Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others and to the extent that picketing has been permitted on private property the right hitherto has been accorded by statute. For example, s. 87 [since rep. & sub. 1975, c. 33, s. 21] of the *Labour Code of British Columbia Act*, 1973 (B.C.) (2nd Sess.), c. 122, provides that no action lies in respect of picketing permitted under the Act for trespass to real property to which a member of the public ordinarily has access.)

As for our own province, we are satisfied on the Hansard records filed by Cadillac Fairview that an amendment to the *Trespass to Property Act* similar in effect to the B.C. provision was specifically proposed to the Legislature by one of its NDP members as recently as 1980, in the course of revisions then being made to that Act, but was not accepted.

65. What is the effect of all of the foregoing on the rights which the complainant seeks confirmation of in these proceedings? It should be noted, first of all, that those rights, as left with the Board for determination, have been circumscribed by the complainant itself to a considerable degree. Portions of the complaint were excised by counsel, in the interest of containing the litigation of the facts to the matters of primary concern to the complainant. In addition, the complainant does not now come before the Board seeking, for example, endorsement of the kind of mass "drops" of propaganda on the sales desks during store hours which the evidence discloses took place during the course of the campaign generally. Nor does it ask the Board to affirm the lawfulness of Union organizers' approaching individual employees who are working on the sales floor, in a manner that they clearly could not do in the ordinary factory or office. The respondent Eaton's, on the other hand, has also adopted a sophisticated legal position before the Board which, *inter alia*, formally recognizes its employees' freedom to chat during working hours about whatever subject they please, so long as their attention to their duties and the customers does not suffer. Further, Eaton's has clarified the stricter aspect of its policy, being the blanket prohibition against distribution of literature, as applying only to distributions of a *broad* or *general* nature, whatever that may come to mean; it does not, for example, apply to the passing of a document, including an application for membership in a trade union, in the course of casual conversation between employees. Beyond that, Eaton's recognizes that, for *employee* organizers at least, the law requires a factual determination in each case as to whether there is sufficient interference with the employer's commercial interest to justify a curtailment on the exercise of section 3 freedoms. It is perhaps the respondent Cadillac Fairview which takes the most "extreme" position in these proceedings, stating that

the law gives it the unfettered right to control the usage of its premises in accordance with what it itself determines is in its own commercial interest. But it must be borne in mind that Cadillac Fairview has an established, non-discriminatory policy of restricted usage that it can point to in that regard, and that *Harrison v. Carswell*, *supra*, goes a long way towards supporting the position that it asserts.

66. In resolving the issues before us, it is not the intention of the Board to simply import the legal doctrines developed by the National Labour Relations Board and Courts in the United States; nor, as noted, have any of the parties suggested that we do so. There is, however, no dispute between Eaton's and the complainant that the approach must necessarily be one of balancing, and we will continue to apply that approach in the way Canadian labour tribunals, including our own Board, have in the past. As the Supreme Court of the United States summarized the tribunal's responsibilities in the benchmark case of *Hudgens v. NLRB*, (1976) 47 L. Ed. 2d 196, at page 208:

"The Babcock & Wilcox opinion established the basic objective under the Act: accommodation of s. 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.' The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective s. 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance."

And obviously, in striking the point of this accommodation on each area in dispute, the Board will be mindful of the other means of effective communication reasonably available to a trade union in the context, as well as of whatever other access rights the Board may find it appropriate to grant in the proceedings.

67. In the light of the "balancing" approach manifested in the case law, having listened to the evidence and the parties' submissions, and having accepted the invitation to view the Mall as described earlier, one of the facts which strikes the Board most prominently is that the point of least *actual* interference with any of the commercial interests of the respondents would appear to be in that semi-enclosed area of the Mall leading to the Eaton's doors at "2 below", well prior to the hour of 10 o'clock when the store opens its doors to the public. As noted above, the Board finds as a fact that at that hour in the morning there is virtually *no* pedestrian traffic in that area beyond the line of support columns other than that comprised of the persons, mainly employees, who are on their way to enter the Eaton's store with their passes. There is, in addition, a reasonably broad area just *inside* the Eaton's doors where a limited number of individuals could stand and hand out literature without unduly restricting the free passage of employees entering at that hour. But the store at this point is *not* open to the public at large, and, on the basis of the legal analysis set forth above, in particular the inferences which may be drawn from section 11 of the Act, it would appear that such activities could only be carried out, if the Board were disposed to endorse them, by Eaton's own employees. The prospect of a Labour Relations Board, however, in effect forcing employees wishing to exercise their section 3 rights to engage in overt union activity in the face of their employer, when the use of professional organizers on the other side of the doorway would be more natural, more constructive from the section 3 point of view, and, if anything, *less* disruptive of any competing commercial interests of the respondents, seems difficult to justify. The Board must be satisfied, therefore, that the law, and in particular *Harrison v. Carswell*, *supra*, offers it no other option.

68. It is our opinion that *Harrison v. Carswell* does *not* substantiate Cadillac Fairview's position in the precise situation now before us. The heart of the majority decision in that case appears to be set out in the following passage at page 78:

"With great respect, I am unable to agree with the majority reasons, delivered in the Court of Appeal by Chief Justice Freedman, for I find it difficult, indeed impossible, to make any well-founded distinction between this case and *R. v. Peters* (1971), 17 D.L.R. (3d) 128, decided by this Court four years ago in a unanimous decision of the full Bench. The constitutional issue raised in *Peters* no longer concerns us; the only other issue was whether the owner of a shopping plaza had sufficient control or possession of the common areas, having regard to the unrestricted invitation to the public to enter upon the premises, as to enable it to invoke the remedy of trespass. The Court decided it did."

The specific question put to the Court in *Peters* was, as Laskin, C.J.C. points out in his dissent in *Harrison*, a strictly legal one, raising the broad issue of whether a shopping-centre owner, by inviting the public onto his premises at certain times and for certain purposes, thereby relinquishes for all time and all circumstances his right to assert the normal rights of proprietorship given effect to under the *Petty Trespass Act*. Clearly the Supreme Court of Canada held in both cases that he did not. But whether or not Chief Justice Laskin was sustained in his view that *Peters* was decided "without any context of fact" at all, it goes without saying that each of those decisions must at the very least be read with due regard to the *actual* facts in the Courts below which prompted them. Neither dealt with "trade union activity" (indeed, the case which set the principle, *Peters*, did not deal with trade union activity at all) at the sensitive stage of initially seeking to canvass employee wishes as to membership in a trade union, and on the face of the decisions it can be seen that in neither of them was the Court asked to consider such activity in the context of what might constitute an "unfair labour practice" under the competing provisions of the *Labour Relations Act*. In fact Dickson, J., in *Harrison* specifically notes the difference a finding of improper "motive" might make to the Court's decision when he observes at page 81:

"There is nothing in the evidence supporting the view that in the present case the owner of the centre was acting out of caprice or whimsy or *mala fides*."

And in the penultimate paragraph of the learned Judge's reasons for decision, he states, once again:

"Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, *save by due process of law*."

[emphasis added]

That such incursions into the domain of property and commercial rights have been necessarily embodied for organizing purposes in labour legislation in the United States is evident from the commentary set out above, and it is apparent that the comparable unfair-labour-practice provisions in our own statute do the same (see again the comments of the Board in *Adams Mine*, cited in paragraph 56 above.)

69. Section 64, once again, provides:

"No employer or employers' organization and no person acting on behalf of an

employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

Dealing with this section, together with the provisions of section 66, the Board in *Skyline Hotel*, [1980] OLRB Rep. Dec. 1811, noted at paragraph 56:

"As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be *presumed* to have intended the consequences of his acts: *A.A.S. communications*, *supra*; *G. W. Martin Lumber*, [1980] OLRB Rep. May 737; *Bank Canadian National*, [1980] 1 Can. LRB 470; *Radio Officers' Union v. NLRB*, (1954) 33 LRRM 2417. Once such conduct has been established, then as a practical matter (and whether or not section 79(4a) of the Act applies to the situation) the onus is upon the employer to come forward with a credible business purpose to justify the conduct (cf. *NLRB v. Great Dane Trailers*, (1967) 65 LRRM 2465)."

Great Dane Trailers itself is an oft-quoted decision of the United States Supreme Court, in which then Chief Justice Warren wrote, at page 2468:

"We noted in *Erie Resistor*, *supra*, at 227, that proof of an anti-union motivation may make unlawful certain employer conduct which would in other circumstances be lawful. Some conduct, however, is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board v. Brown*, *supra*, at 287; *American Ship Building Co. v. Labor Board*, *supra*, at 311. That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.' *Erie Resistor Corp. v. Labor Board*, *supra*, at 228, 231. If the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away, justifying or characterizing 'his actions as something different than they appear on their face,' and if he fails, 'an unfair labor practice charge is made out.' *Id.*, at 228. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Id.*, at 229. On the other hand, when 'the resulting harm to employee rights is ... comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is *prima facie* lawful,' and an affirmative showing of improper motivation must be made."

And more to the point, on the facts of this case, the Board at paragraph 20 of *Adams Mine* wrote:

"An employer who nevertheless enforces a no-solicitation rule that has the effect of preventing employees from, for example, soliciting union membership on company premises during non-working time will be found by this Board to have intended this result and therefore to have acted contrary to section 66(c) and section 64 of the Act unless the employer can establish by cogent evidence that its purpose was to preserve property, to prevent serious disturbance, ensure productivity or preserve plant safety. See *Audio Transformer Company Limited*, *supra*, page 1003. Where the latter is established, union solicitation that is seriously disruptive of managerial interests can be regulated by an employer even though the incidental effect is to constrain protected activity. In such circumstances, the Board construes the employer's actions as aimed solely at the preservation of its bona fide right to manage.

70. That section, and that theory, of the Act is applicable not only to employers, as the above cases discuss, but in the words of the section, to anyone acting "on behalf of " an

employer. In the same way, therefore, anyone who, acting on behalf of an employer, seeks to enforce a policy that has the effect of interfering with employees' access to information or opportunities for organizing, without a valid business justification, is guilty of an unfair labour practice. Section 64 was not, once again, before the Court in *Harrison v. Carswell*, and we do not think that anyone would argue that the Court, by its decision, was granting to Mall-owners a blanket exemption for unfair labour practices. The question with respect to Cadillac Fairview remains, therefore, much as it began in this case: can Cadillac Fairview be said on the facts before us to be a person "acting on behalf of" the employer Eaton's when it acted to prohibit certain organizing activities of the complainant, and did it have the requisite intent to constitute an unfair labour practice when it did so? The facts relating to both of those questions are, to a large extent, intertwined.

71. The two respondents are, to begin with, obviously not "strangers" to one another with respect to the shopping-centre here in question. Quite apart from Eaton's 20 per cent holding in the head-leasing company, and its seats on the Board of Directors, Cadillac Fairview and Eaton's operate in the shopping centre in the daily commercial relationship of landlord and tenant. Clearly this relationship alone is insufficient to establish that any act of Cadillac Fairview which has the effect of benefitting Eaton's is an act done "on behalf of" Eaton's, and the approach of the majority of the Court in *Harrison v. Carswell* would seem to underscore this. The Board takes it as established in *Harrison* that the owner/landlord of a shopping mall has an identifiable commercial interest of his own in ensuring generally that traffic in the mall is not disrupted nor customers distracted, even by peaceful and orderly forms of activity, and where activity occurs which poses a tangible threat to such interest, the landlord may well be viewed as acting on his own in taking steps to stop it. Where, however, neither interference, nor, indeed, contact with the shopping public can be shown to exist at all, it becomes more difficult for the landlord to argue that it is acting pursuant to any interest other than that of satisfying the wishes of its tenant (and in this case, its prime tenant in the shopping-centre which bears the tenant's name) in restricting, to the extent that it has, the efforts of those seeking to organize the employees of that tenant.

72. We have not forgotten that the respondent Cadillac Fairview asserts that it maintains a *broad, non-discriminatory* solicitation policy as a means of maintaining necessary control over the activities which take place in this popular centre of pedestrian traffic. Nor have we any doubt that such controls are needed. The problem is, as with the case of employers, that a broad solicitation policy does not stand on the same legal footing vis-a-vis activities which are specifically protected by statute, and those which are not. This was recognized in the United States, for example, at least as early as the *Republic Aviation* case, *supra*, (1944) 324 U.S. 793, where the Circuit Court of Appeals concluded its judgment by stating:

"In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate s.8(3) [prohibiting discrimination] because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of s.8(3) in that it discourages membership in a labor organization."

Or as more broadly put by the National Labour Relations Board in *Marshall Field, supra*, (1952) 98 N.L.R.B. 88, at page 91:

"The Respondent asserts that union organizers and employees acting in that

capacity are not given treatment disparate from that accorded other solicitors. The record supports the contention that the Respondent attempts to exclude all soliciting for whatever purposes from the public areas of the store. It is thus true that union organizers are not discriminated against in comparison to other groups. That fact, however, does not render the Respondent's prohibition of union solicitation in non-selling public areas lawful. The right of employees to engage in concerted activity, of which solicitation on behalf of a union is an inherent part, is guaranteed by the Act, unlike solicitation for such purposes as insurance, boat rides, or newspaper subscriptions. The lack of any discrimination, therefore, between the treatment accorded union solicitors and other solicitors cannot excuse the denial of the statutory right protecting the former."

And more recently by the Canada Labour Relations Board in its *Canadian Imperial Bank of Commerce* case, *supra*, at page 22:

"In dealing first with the question of the Bank's policy regarding solicitation, the Board wishes initially to indicate that one must distinguish between the Bank's right to prohibit solicitation by organizations such as the United Appeal or Canada's Wonderland from the right of the Bank to prohibit solicitation by a trade union. The former is completely within the purview of the Bank to allow or not. The latter is not."

It seems to us that Cadillac Fairview is in the same position. If it is found to be a person acting "on behalf of" the employer Eaton's, neither a record of non-discrimination nor a "floodgates" kind of argument is available to it as a justification for conduct which patently interferes with the statutory organizing rights of Eaton's employees. Cadillac Fairview's "defence" in this case, therefore, must rest on the risk of *actual* interference to its commercial interest in the Mall. But what is its commercial interest affected when organizers of the complainant seek to carry on their statutorily-endorsed activities by attending in the area of the Mall at "2 below" immediately outside Eaton's doors, at a time well before store opening when, to all intents and purposes, the only persons traversing that Mall area are employees of Eaton's, or to a much lesser extent suppliers, and the only persons raising any detectable complaint about the activity are the management personnel of Eaton's, or other employees of Eaton's equally unenthusiastic about the prospect of Union organization? Such persons in either of those categories are, of course, wholly entitled to hold the views that they do. But neither of them in the circumstances under consideration can show any interference with their own legitimate activities, such as would offset the importance of access to that Mall area at that hour of the day to the exercise of statutory organizing rights.

73. Nor can Cadillac Fairview. In light of its commercial relationship with Eaton's, the Board does not find it persuasive that Cadillac Fairview has from time to time tightened or loosened its policy of control with respect to the activities of the complainant's organizers in the Mall, or that its security officers decided, notwithstanding requests from Eaton's supervisors, to curtail the organizers' activities only to the extent that they exceeded the limits of that policy in effect at a given time. Rather, the Board finds that the respondent, Cadillac Fairview, in both the broad no-solicitation policy that it did enforce, and its letter of September 28, 1984, pursued an *overall* policy of control which was clearly in line with the desires of Eaton's. Where that policy lacked a sustainable business justification of its own, we find it to have been an unlawful interference with the organizing rights of the Eaton's employees, carried out on behalf of its prime tenant Eaton's. More specifically, we find no sustainable business justification has been made out for Cadillac Fairview having sought to prohibit organizers for the complainant from standing as they did outside the Eaton's doors at 2 below in an area of the Mall *otherwise open to the public*, at a time when no other members of the public at large were in any way interfered with, for the purpose of handing out literature

to employees entering the Eaton's store, without obstructing that entry, or of being available to engage in conversation with any employees who so chose. In the absence of such business justification, we find the action of Cadillac Fairview to have been simply an unfair labour practice, in violation of section 64 of the *Labour Relations Act*.

74. Of the other means of communication sought to be established through this complaint, the respondent Eaton's, as noted, has made it clear that it does not seek to control the content of the casual conversation of its employees, even during working hours, so long as employees continue to be faithful to their duties. That is all that the complainant seeks in this regard. That leaves for consideration, therefore, the issue over usage of the Eaton's restaurants for soliciting, and the issue of "distribution" on the Eaton's premises at large.

75. With respect to its public restaurants, the position of Eaton's is very different from that of the employer in, e.g., *Skyline Hotel, supra*, [1980] OLRB Rep. Dec. 1811, where the employer adopted a practice of having anyone simply identified as a Union organizer removed from the *public* areas of its restaurants and bars. It is also different from that of the employer in *Montgomery Ward*, [1976] CCH NLRB 20,992, a case relied upon by the complainant. The facts giving rise to the *Montgomery Ward* decision are set out in part at page 27,194 as follows:

"Later, in the public restaurant, a union representative and an off-duty employee were having coffee and were approached by the employer who told them that no one was supposed to talk union on company property. The employer testified that the new store had observed a no-solicitation rule from its opening. Although not in writing, the rule provided that no solicitation was allowed by members of organizations of any employees at any time in the public sales area, including the restaurant."

Eaton's does not seek to impose a broad no-solicitation rule on its restaurants, nor does it object to either employee or non-employee organizers seeking to have an employee sign up for the Union in its restaurants over coffee or lunch. Its objection is to the Union or its supporters "setting up shop" in the public restaurant, or engaging in unsolicited "table-hopping", or otherwise converting the restaurant facility to something other than its primary use, to the potential annoyance of the patrons of the restaurant, be they employee or non-employee customers.

76. Eaton's position in this regard is consistent with the approach taken by the National Labour Relations Board in, for example, *Marshall Field* once again, (1952) 98 N.L.R.B. 88, where the Board, at pages 93 and 94, was considering the use of such department store areas distinct from the "selling floor" as public waiting-rooms, restrooms and restaurants:

"Solicitation in public waiting rooms and rest rooms, however, if subject to reasonable restrictions, could have only a slight, if not nonexistent, effect upon public use of such facilities and no adverse effect on sales activities. To equate the situations presented by solicitation in these areas with that presented by such activity in the remainder of the store, is, therefore, to ignore reality at the expense of employee rights to concerted activity. Accordingly, we find no compelling reason for denying off-duty employees the right to solicit and be solicited for union membership in such space. Far from converting these areas into organizational arenas, however, we find such solicitation permissible only insofar as it is not incompatible with the purposes for which the areas have been set aside for public use. The Respondent may adopt reasonable rules to insure that solicitation is carried on only as an incident to normal use of such facilities.

• • •

The Respondent's specific rule regarding solicitation in the public restaurants . . . appears to be lawful and suitable to the particular situation in such areas. The restrictions imposed by this rule are designed to insure that solicitation is carried on in the public restaurants only as an incident to normal use of such facilities. As such, they are entirely consistent with the Board's holding, above, as to permissible restrictions in other nonselling public areas. This situation, it is clear, would be appreciably changed were the Trial Examiner's recommendation accepted that organizers be allowed to move freely from one table to another. Such solicitation *seriatim* would basically alter those circumstances which differentiate the restaurant areas from the selling floors. Moreover, it would be incompatible with normal use of these facilities at the expense of the Respondent's business."

We agree with the National Labour Relations Board's analysis, and adopt it in the case at hand.

77. The "no-distribution" question is more difficult, in part because the extent of its application has not yet been developed by the facts, or by the employer. The "lingering presence" argument appears to have found favour with the National Labour Relations Board, which noted in, e.g., *Stoddard-Quirk Manufacturing Co.*, (1962) 138 N.L.R.B. 615, at page 616:

"In short, we believe, contrary to our dissenting colleagues, that a real distinction exists in law and in fact between oral solicitation on the one hand and distribution of literature on the other. Further, we believe that logic and precedent call for recognition of this distinction and its legal effects."

We understand the focus of the complainant at this stage to be a right of distribution in Eaton's restaurants only with respect to the Bites 'n Nibbles area where employees generally congregate for coffee prior to store opening (although any broader claim would be dealt with by the comments of the Board in paragraph 76, *supra*). Interference with "the public" is therefore at a minimum (there are said to be non-Eaton's personnel such as cleaners, suppliers and concessionaire employees using the restaurant at that hour as well). On the other hand, we do accept the submission of Eaton's that even from the point of view of its own employees, they are "customers" of the restaurant in every sense and it must compete for their business with the host of other coffee outlets located, in the context of the Eaton's Centre, in the immediate area. Recognition of this business interest, therefore, would seem to require that Eaton's not be forced to grant a totally free hand to the complainant's supporters with respect to the distribution of literature in the restaurant, notwithstanding the fact that employees there are on their own time.

78. The other distribution right which the complainant asserts is the right to have employees drop literature onto the various sales-desks in the store prior to store-opening. In the *Canadian Imperial Bank of Commerce* case, as noted *supra*, the Canada Board decided that it was proper for the Union to conduct drops of literature on the chairs and desks of employees in the Bank's Chargex and Mortgage Corporation centres. The Board also noted that it was within the employer's normal powers to require that all such literature be cleared away before the commencement of working hours.

79. Once again we accept the submission of the respondent Eaton's that there is some difference in the Bank case from the case of a department store, where the distracting material, if *not* cleared away, will have found its way to a public "selling-floor" area. Having regard to the other avenues of communication available to the complainant in this case, including (but

not limited to) the sizeable in-house committee it has effectively recruited and the forms of media advertising employed by it, for example, in Winnipeg, together with the access obtained through this decision to the main employee entrance from the Mall (and, inferentially, to any other employee entrance exhibiting a comparable traffic pattern), we are of the view that mass distribution within the store itself ought to take place on only a limited basis, especially in the restaurant area of Bites 'n Nibbles, in order to accommodate the legitimate business concerns of Eaton's as well. There may, for example, be material like notice of meetings which the complainant is particularly concerned reach as broad a range of employees as possible, and we do not think that the peaceful distribution of union literature on a very much occasional basis would, even in Bite 'n Nibbles, be such as to raise a reasonable likelihood that Eaton's employees would cease to frequent the respondent's restaurant. And as for the sales floor, while, once again, we are speaking only of the period prior to store opening, and acknowledge the right of Eaton's to require that all such material be removed from the sales floor at times when the store is open to the public, we do not see that the remaining organizing needs of the complainant and its employee constituency should force the employer Eaton's to monitor this task of clean-up, under threat of discipline, as an everyday occurrence. There comes a point, it seems to us, where in the words of *Adams Mine*, the repeated distribution of literature within the store, even in the circumstances discussed here, becomes more than "a minor annoyance or inconvenience", and swings the balance of accommodation back to the employer.

80. Finally, the complainant asks the Board by way of relief to make some accommodation in this case in its "six-month" and "twelve-month" rules respecting the use it will make of membership evidence, in light of the unlawful interference in its campaign by the respondents to date. The complainant also submits that those rules constitute unjustifiable restraints on the "freedom of association" guaranteed by the *Charter*.

81. The Board does not accept either of those submissions. The reference of the complainant is to the Board's "rule" or practice of giving weight to cards that are more than 6 months old only to the extent of ordering a vote upon them, and of giving *no* weight to cards that are more than a year old. The rules themselves, however, do not purport to limit an employee's right to belong to an organization if he so wishes; they only place limits on the extent to which the Board, in trying to satisfy itself as to what those wishes in fact are, is content to rely upon a "hearsay" form of documentary evidence. See, e.g. the Board's discussion in *Primo Importing & Distributing*, [1982] OLRB Rep. Dec. 1869. If that can somehow be said to run afoul of the guarantee of "freedom of association" in section 2 of the *Charter*, it seems to us that it is in any event a restriction demonstrably justifiable under section 1 for the purpose of ensuring that employees in a proposed bargaining unit not be forced to accept a particular trade union as their exclusive bargaining agent, without that trade union having, as of the time fixed by the Board under section 7(1) of the *Labour Relations Act*, the requisite level of support specified by the Act. By the same token, the Board is not in a position to grant special dispensation from the rule on the basis of particular circumstances, since the basis for the rule is not one which the Board has control over in any event. The basis for the rule is nothing more than the effect that the passage of time *alone* has on the reliability of "hearsay" and documentary evidence of membership, and the particular causes of such passage of time do not alter that. Obviously, no one can identify the precise point in time at which an earlier indication of collective bargaining interest can no longer be treated as reliable, and to that extent the establishment of any fixed guidelines necessarily involves a strong element of "arbitrariness". But, so would the fixing of such a point on a case by case basis - while at the same time depriving a trade union from at least

the element of predictability, upon which it can make an assessment of its own position, and determine its own manner of proceeding accordingly. It seems to us that the trade union movement would be little served by the adoption by the Board of a less "arbitrary" approach than it presently employs.

82. In summary, then, the Board finds that, whether or not the respondent Eaton's has in the past failed to distinguish working from non-working time when discussing its "no-solicitation" policy, it has, in these proceedings, since clarified its position in that regard in a clearly lawful form, and no further order by the Board is necessary. With respect to general distribution of literature on company premises, the Board finds that Eaton's has demonstrated a justifiable business interest in seeking to place limits on such distribution. The Board has, however, found that that interest would not be unreasonably compromised by the *occasional* distribution of literature by employees prior to store opening on the sales desks or in Bites 'n Nibbles, subject always to the right of the respondent Eaton's to direct such literature to be cleared away prior to store opening. To the extent that the respondent Eaton's has sought to apply a *blanket* no-distribution rule to its premises, even at times when the store is not open to the public and employees are not working, the Board finds it in violation of section 64 and 66 of the Act. The board notes that Eaton's own policy has not yet been fully developed with respect to more limited and informal kinds of "distribution", and there are no factual incidents before the Board upon which it can make a finding.

83. With respect to the respondent Cadillac Fairview, the Board concludes that its reliance upon a broad no-solicitation policy that interferes with the statutory organizing rights of Eaton's employees, and their access to the complainant at a time and place in the Mall where the lack of normal contact with other users of the Mall vacates any business justification, is an act done "on behalf of" the employer Eaton's, and in violation of section 64.

84. The Board accordingly directs:

- a) that the respondent Eaton's, in accordance with paragraph 82 above, cease to insist upon a "no-solicitation" policy which includes a blanket prohibition against the distribution of union literature in the store;
- b) that the respondent Eaton's sign and forthwith circulate to all of its employees of the Eaton's Centre store, in a manner of its own choosing, the Notice appearing as an Appendix to this decision;
- c) that the respondent Cadillac Fairview permit employees of the respondent Eaton's to have unrestricted orderly access to the complainant's organizers at times and in areas of the Mall where normal contact with other users of the Mall does not exist.

The Board does not consider further relief appropriate in the circumstances of this case.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Issued by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER
OF THE ONTARIO LABOUR RELATIONS BOARD.

AT THE HEARING BEFORE THE BOARD WE MADE IT CLEAR THAT
OUR "NO-SOLICITATION" POLICY DOES NOT PROHIBIT EMPLOYEES IN
THE STORE AT ANY TIME FROM ENGAGING IN CASUAL CONVERSATION
WITH RESPECT TO UNIONIZATION OR ANY OTHER SUBJECT THEY MAY
CHOOSE, SO LONG AS THE PROPER OPERATION OF THE STORE IS NOT
INTERFERED WITH.

WE WOULD INDICATE ALSO THAT, PURSUANT TO THE ORDER
OF THE BOARD, GENERAL DISTRIBUTION OF UNION LITERATURE IS
NOT PROHIBITED ON THE SALES FLOOR OR IN OUR RESTAURANTS
PRIOR TO THE STORE OPENING, BUT IS SUBJECT TO CERTAIN
LIMITATIONS WHICH THE BOARD, IN ITS DECISION, HAS IMPOSED.

T. EATON COMPANY LIMITED

3080-84-M Windsor Western Hospital (Riverview Unit), Employer, v. Ontario Nurses' Association, Trade Union, v. Anisia Mordowanec, Intervener

Arbitration - Reference - Grievor's discharge grievance dismissed - Board finding both union and employer acted unlawfully with respect to grievor's grievance - Directing grievance be referred to arbitration a second time - Employer applying for judicial review and refusing to appoint nominee to second Arbitration Board - Whether Minister having authority to appoint employer nominee - Whether Board deferring reference until after judicial review decision

BEFORE: *R. O. MacDowell*, Vice-Chairman and Board Members *R. J. Gallivan* and *P. Grasso*.

APPEARANCES: *Leonard P. Kavanaugh, Q.C. and A. J. Lopes* for the employer; *Donald F. O. Hersey, Q.C. and Dan Anderson* for the trade union; *Mary Cornish* for the intervener.

DECISION OF THE BOARD; June 13, 1985

I

1. This is a reference to the Board under section 107 of the *Labour Relations Act*. The Minister of Labour has referred to the Board a question that, in his opinion, relates to his authority to make an appointment under section 44(4) of the Act, so that an arbitration board may be established to consider whether Windsor Western Hospital had "just cause" to discharge the intervener, Anisia Mordowanec. The provisions of the *Labour Relations Act* potentially relevant to this matter are as follows:

107.-(1) Where a request is made under section 16, subsection 44(4) or subsection 45(1), the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

(2) Where a question referred under subsection (1) involves an issue as to whether one trade union is the successor of another trade union or whether a business has been sold by one employer to another or where such question involves an issue under subsection 63(11), the Board has the same powers and authority as it has under section 62 or 63, as the case may be, as if an application had been made thereunder, and the Board may issue such directions as to the conduct of the proceedings as it considers advisable.

44.-(4) Notwithstanding subsection (3), if there is a failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

89.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention

of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

106-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

(3) Where the Board has authorized the chairman or a vice-chairman to make an inquiry under clause 103(2)(h), his findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he may, if he considers it advisable to do so, reconsider his findings and conclusions on facts and vary or revoke any such finding or conclusion.

108. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warrant, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

In addition, we might note the terms of section 25 of the *Statutory Powers of Procedure Act*:

25.-(1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

(2) An application for judicial review under the *Judicial Review Procedure Act*, or the bringing of proceedings specified in subsection 2(1) of that Act is not an appeal within the meaning of subsection (1).

2. This is one of a number of proceedings, past and present, arising from Ms. Mordowanec's termination in June, 1982. In order to appreciate the context in which the instant case arises, it may be useful to sketch in some of the background and the results of

certain earlier proceedings before this Board. For ease of reference, Windsor Western Hospital will be referred to as "the Hospital", and the Ontario Nurses' Association will be referred to as "ONA".

II

3. The complainant is a registered nurse. She has worked for the Hospital for some 27 years. On May 31, 1982, she was suspended pending investigation of alleged improper treatment of a patient.

4. At the time of the alleged wrongdoing, the complainant's charge nurse was Ms. Mary DeByl-Wowchuk. Ms. DeByl-Wowchuk was also the local union president. In her capacity as charge nurse, she filed critical reports questioning the complainant's competence. In her capacity as union president, she attended a "disciplinary interview" leading to the complainant's termination. The quality of representation provided at the disciplinary meeting was the basis for a complaint before this Board alleging that ONA had breached its duty of fair representation (Board File 2287-83-U).

5. The disciplinary meeting took place on June 9, 1982. The complainant was required to attend. Under the applicable collective agreement the complainant was clearly entitled to union representation. Ms. DeByl-Wowchuk was the only union official present at the meeting, however, it would be somewhat misleading to describe her as the complainant's "union representative". Ms. DeByl-Wowchuk took no active part in the meeting. She did not attempt to advise or represent the complainant. Ms. DeByl-Wowchuk only took notes.

6. At the meeting, the Hospital misled the complainant into believing that if she signed a resignation letter there would be no negative report to the College of Nurses. That assertion was false. The Hospital did report her to the College of Nurses, which conducted an enquiry into the charges of professional misconduct and incompetence. Ms. DeByl-Wowchuk gave evidence against the complainant. The charges were dismissed.

7. At the disciplinary meeting on June 9, 1982, the complainant was upset. She requested an adjournment so that she could talk to her husband or a lawyer. She requested a delay until that afternoon when Ms. Jan Davidson, a union employee relations officer, would be available to represent her. The complainant had already spoken to Ms. Davidson and arranged to meet her later that day. The complainant did not want to be represented by Ms. DeByl-Wowchuk. Ms. DeByl-Wowchuk was not impartial. The Hospital insisted on proceeding immediately.

8. Ms. DeByl-Wowchuk was in a conflict of interest position. She could not, and did not, assist or represent the complainant. Ms. Davidson would have been able to supply such union representation, but the Hospital was not prepared to await her arrival. It is difficult to resist the inference that the Hospital knew that if the complainant had Ms. Davidson's assistance, it would not be able to successfully mislead her and obtain a resignation letter; and, if it proceeded with a dismissal, it might have some difficulty establishing "just cause" for the discharge of an employee with twenty-seven years' service. The Hospital was content

to engineer, and exploit, a situation in which the complainant was without any actual union representation. In any event, that was the unanimous opinion of the panel of this Board which heard the earlier case. The Hospital chose to call no evidence, and thus tendered no explanation as to why it could not await the arrival, later that afternoon, of the union representative the complainant had so clearly requested.

9. The resignation letter was signed late in the morning of June 9, 1982. That afternoon, the complainant did have occasion to discuss the matter with Ms. Davidson. That evening, the complainant delivered to the Hospital a written revocation of her resignation. The Hospital refused to accept it. The Hospital's response was that even if the complainant had not resigned she was terminated for cause.

10. Thereafter, the union filed a grievance on the complainant's behalf. The grievance was ultimately taken to arbitration. Unfortunately for the complainant, the arbitration board ruled that because of the resignation letter, it had no jurisdiction to determine whether the Hospital had "just cause" to terminate the complainant's employment. She had "quit" voluntarily.

11. On January 5, 1984, the complainant filed an unfair labour practice complaint before this Board alleging that the union had breached its duty of fair representation. The complaint against ONA was based upon the failure of ONA to provide proper representation at the disciplinary meeting. This complaint was later amended to include an alleged breach of sections 64 and 66 of the Act by the employer Hospital. In addition, the union filed its own complaint against the employer Hospital alleging breaches of sections 64 and 66. The unfair labour practice complaints against the Hospital were both based upon the Hospital's purported interference with the right to union representation at the disciplinary meeting. These two related cases (i.e. against ONA and the Hospital) were eventually heard by the same panel of the Board. Both were successful.

12. For reasons more particularly set out in the Board decision of November 9, 1984, ([1984] OLRB Rep. Nov. 1643) the Board concluded that the union had breached its obligation under section 68 of the Act to properly represent the complainant at a time when the complainant's critical job interests were at stake. However, the Board also found that this absence of representation was brought about, in part, by the actions of the Hospital. The Board held that the Hospital had interfered with the complainant's *statutory right* to union representation which she had clearly requested and which, in practical terms, had been expressly denied. The Board cited with approval certain comments in *J. Weingarten Inc. and Retail Clerks, Local 455*, (1973) 485 F. 2d 1135, 84 LRRM 2436 (U.S.C.A. - 5th Circuit, *certiorari* granted (1975) 430 U.S. 251 (Supreme Court)), where the Supreme Court of the United States held that language similar to that found in the *Labour Relations Act* guaranteed an employee's right, upon request, to have union representation at a disciplinary meeting where his critical job interests are at stake. [See generally: C.J. Morris, Editor, *The Developing Labour Law*, B.N.A. Washington, 1983 at pp. 149-156. See also: the decision of the Quebec Labour Court in *Chapdelaine v. Emballage Domtar Ltee*, 84 CLLC 14,013 where that tribunal reached the same conclusion.] The Board did not explore the full ambit of this statutory right to representation (which has been well established in the United States), but observed that it was not for the employer to decide who would be the employee's representative at a disciplinary hearing, or to raise barriers to union representation which cannot be reasonably justified. No justification was advanced, because, as noted, the Hospital called no evidence.

13. The Board was then faced with the dilemma of how to fashion an appropriate remedy for these combined breaches of the Act. In a typical unfair labour practice discharge, the Board normally directs the reinstatement of the aggrieved employee with compensation for lost wages. However, the circumstances before the Board were somewhat novel. It was a little unusual for a termination to result from what might be described as a double illegality. Nor was it by any means clear how the liability should be apportioned between ONA and the Hospital, when it was arguable that, but for the Hospital's default, there might have been no termination, and any failure of representation on ONA's part would have been rectified. Finally, there was the matter of the complainant's own delay in launching these unfair labour practice complaints. Her discharge occurred in June of 1982, but it was not until January, 1984 that she sought to pursue any remedy before this Board against her employer or her bargaining agent. In a preliminary ruling, the Board decided that this delay would not be an absolute bar to a consideration of her complaint, but might well be a factor to be considered if the complaint were ultimately successful and the Board had to deal with the question of remedy or compensation.

14. Ultimately the Board decided that the crux of the problem was the termination letter, which it found, would not have been tendered, but for the illegal conduct of both the union and the Hospital. Without that termination letter, upon which the arbitration board ultimately relied, the employer would have had to rely upon its alternative position that the complainant had been discharged for cause. Whether or not that position could be sustained would depend upon the strength of the employer's case against her. While the opinion of the College of Nurses might suggest the likely result, it would not be binding upon an arbitration board which would have to make up its own mind based upon the evidence before it.

15. The collective agreement envisages arbitration as the appropriate mechanism for resolving such questions and, while the Board might well have decided to deal with all of these issues itself, it decided that the more appropriate route was to direct that the propriety of the complainant's discharge should be determined by a board of arbitration constituted pursuant to the terms of the collective agreement. The Board remained seized in the event that there was any difficulty in the implementation of this remedial order, and in the event that the complainant was successful at arbitration, there was some dispute with respect to the amount or allocation of compensation (again, bearing in mind the complainant's own delay in launching these proceedings). The relevant portion of the earlier decision reads as follows:

35. The Hospital extracted a letter of resignation from Mrs. Mordowanec by unlawful means (and in circumstances where the union breached its statutory duty of fair representation to her), successfully relied on that letter before an arbitration board that was unaware that it had been obtained by illegal means and now seeks to shield itself from any attempt by this Board to go behind the award of that board of arbitration. Just as the Board and the Court in *Traugott* refused to give any force or effect to a document obtained by illegal means, so also we are not prepared to give any force or effect to the letter of resignation obtained by illegal means or the arbitration award that relied on that letter in refusing to provide Mrs. Mordowanec with a hearing on the merits. Mrs. Mordowanec, a nurse with 27 years of service with the Hospital, is entitled to be put in the position she would have been in had it not been for the breach. We have the authority under section 89(4) of the Act to direct a hearing on the merits and in all the circumstances we hereby exercise our discretion to direct, notwithstanding the time limits in the collective agreement, that Mrs. Mordowanec's grievance with respect to her termination of employment be heard on the merits. The parties are directed to forthwith appoint their respective nominees to the arbitration board and to recommence the arbitration process established under the collective agreement for the purpose of determining if the Hospital had just cause to terminate the employment of Mrs. Mordowanec.

36. The Board will remain seized in the event of any difficulty with the implementation of our remedial order, and in addition, we will remain seized in the event that Mrs. Mordowanec is successful at arbitration and there is some dispute with respect to compensation.

[emphasis added]

16. But the Board decision was not the end of the matter. The Hospital refused to comply with the Board's order. The Hospital refused to appoint its nominee to the board of arbitration. The Hospital takes the position that the Board decision is wrong, and that it should not have to justify its decision to terminate the complainant's employment.

17. The Hospital does not deny that it has failed to comply with the Board's order. The Hospital says that it has applied for judicial review. However, the Hospital has not sought a "stay" of the Board's direction as it is entitled to do pursuant to section 4 of the *Judicial Review Procedure Act*. Nor has it asserted that, pursuant to section 6, the case should be dealt with expeditiously by a single judge of the High Court. Meanwhile, of course, more than six months after a Board decision in her favour, almost three years after her termination, and despite a decision by the College of Nurses dismissing the allegations of incompetence and professional misconduct, the complainant remains unemployed, awaiting the establishment of a board of arbitration which will determine whether there was just cause for her termination.

18. Given the crowded Court calendar and the vagaries of litigation, it is difficult to predict when the Divisional Court might hear the application for judicial review (leaving aside any question of further appeals). The fall of 1985 appears to be a reasonable assumption. When the Court might render a decision is difficult to predict.

19. It is equally difficult to predict the results or the potential judicial outcomes. For example, if the Court were to hold that the arbitration remedy was beyond the Board's jurisdiction, but did not disturb the finding that the Hospital breached section 64, the Board might have to determine what remedy, if any, should flow where the union's illegality set the stage for an employee discharge, but the employer's illegal conduct effectively prevented a subsequent rectification of that problem. Indeed, how would one apportion liability if the Hospital's judicial review failed and the complainant's grievance succeeded - particularly given her own delay in seeking relief before this Board? These questions are novel, and it is probably inappropriate to speculate as to how they might be resolved.

20. With this background, we turn to the issues in the instant case.

III

21. The Hospital takes the position that as a matter of discretion, the Board should not entertain this reference but rather should adjourn the hearing and defer consideration of the Minister's enquiry until after the decision of the Divisional Court in the application for judicial review. The Hospital asserts that if it succeeds in its application for judicial review, there would

be no need to appoint an arbitration board to consider the merits of Ms. Mordowanec's termination. The Hospital also takes the position that the second arbitration proceeding (i.e., the one directed by the Board following the finding of illegal conduct on the part of the Hospital and ONA) would *not* be a nullity if the underlying Board decision directing that reference to arbitration were quashed. The Hospital argues that it would be prejudiced if that arbitration proceeding was set in motion.

22. As a matter of statutory interpretation, the Hospital contends that there has been no failure to constitute a board of arbitration under the applicable collective agreement. A board of arbitration has already been constituted and has made a determination in the Hospital's favour. The Hospital argues that section 44(4) of the Act has no application in these circumstances. The arbitration process contemplated by the collective agreement has already been exhausted. The arbitration process envisaged by the Board's remedial order is not one pursuant to the collective agreement at all, but rather is a new and quite different kind of arbitration proceeding flowing from the remedy granted by the Board under section 89 of the Act. What is contemplated by the Board's order is a hearing *de novo* on the Hospital's alternative submission that there was "just cause" for Ms. Mordowanec's termination. This is a procedure rooted in the Board's own order, rather than the parties' collective agreement. If ONA and Ms. Mordowanec are unhappy about the Hospital's refusal to comply with the Board's remedial order, their remedy lies not in a request to the Minister under section 44(4), but rather a request under section 89(6) to file the Board's order in the Supreme Court so that it can be enforced.

23. We have considered the Hospital's submissions and are of the view that there are a number of factors which must be considered. In the first place, the mere filing of an application for judicial review does *not* operate as a stay of the Board's decision or warrant a refusal to comply with an earlier Board determination. On the contrary; section 25 of the *Statutory Powers Procedure Act* clearly distinguishes between "appeals" and applications for judicial review, and provides that the latter do *not* stay the effect of a Board decision. The opinion of Robins, J. in *Re International Woodworkers of America and Patchogue Plymouth, Hawkesbury Mills* (1976) 14 O.R. (2d) 118, relied on by the Hospital, has no application. That decision involved the decision of an arbitration board to which the *Statutory Powers Procedure Act* does not apply, and which is not protected by the kind of privative clause found in section 108 of the *Labour Relations Act*. Nor is it the Labour Relations Board's practice to adjourn or stay its process simply because an application for judicial review has been filed (see *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183* [1973] 3 O.R. 832 (C.A.), reversing [1971] 1 O.R. 383 (O.H.C.)). We might also take note of the comments of Krever, J. speaking for a unanimous Divisional Court in *Dominion Dairies Limited v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647*, and *Ontario Labour Relations Board*, May 1, 1979 (unreported):

It is our view that we ought not, except in cases where it can be demonstrated that it is necessary to do so in order to do justice, to interfere with the process of a tribunal such as the Ontario Labour Relations Board. We certainly do not want to do anything that would give judicial recognition to a proposition that, simply upon applying for a stay, the process that the legislation provides for can be interrupted merely as a matter of course.

(See also: *Wells Fargo Armcar Inc. v. OLRB et al.* (1981) 34 OR (2d) 99.) Once the Board has made a decision, parties are ordinarily expected to abide by it until the Courts rule otherwise.

24. We do not think it is appropriate or seemly for this panel of the Board to enter into a discussion about whether a Superior Court would grant a stay of the earlier Board order or quash the Board decision. It suffices to say that we see no reason why we should disregard the earlier Board decision until a Court of competent jurisdiction orders a stay of proceedings.

25. If the Minister helps constitute a board of arbitration which subsequently holds hearings to determine whether the Hospital had just cause to dismiss Ms. Mordowanec, the Hospital may be put to some expense to defend its position and demonstrate why, after 27 years' service, discharge was appropriate. But, in the context of this case, that is not irreparable damage or even a serious inconvenience bearing in mind the countervailing hardship borne by the aggrieved employee, who has been out of work for more than three years, even though the College of Nurses was not persuaded that she was guilty of any professional misconduct or incompetence. Moreover, while delay may suit the Hospital's purposes and the Hospital may be prepared to shoulder any resulting increase in its liability, ONA is not. The longer the arbitration is delayed, the greater will be the potential compensation payable if the complainant is successful. ONA may bear responsibility for some or all of that amount, and urges the Board to get on with the matter.

26. In our own view, neither the scheme of the Act nor the circumstances of the case warrant an adjournment of this reference. Indeed, given the wording and purpose of section 107, we do not think the Board should do so. If the Minister seeks the Board's opinion, it is the Board's responsibility to give it.

27. In its decision of November 9, 1984, the Board directed, quite clearly, that the parties constitute a board of arbitration in accordance with the formula set out in their collective agreement for the purpose of determining if the Hospital had just cause to terminate Ms. Mordowanec's employment. By that direction, the Board sought to put her in the same position that she would have been in had there been no statutory violation by the union or the Hospital. Can it be said that this arbitration process is generically different from that ordinarily available to the parties and to which section 44(4) would clearly apply? We do not think so.

28. The Board's remedial order does no more than require the Hospital to prove its alternative submission before a board of arbitration established in accordance with the collective agreement. The earlier board of arbitration did not consider that question because it was of the view that the resignation letter was a bar to any assessment of the real merits of Ms. Mordowanec's discharge. The Board decision removes that obstacle. While the Board could have dealt with the matter itself, or directed arbitration on terms subject to its control, the Board determined that it was most appropriate to respect the parties' own bargain and order that the matter should proceed to arbitration, on its merits, in accordance with the formula the parties have agreed upon. In our view, that process is one to which section 44(4) applies, and the Minister therefore has the authority to appoint a nominee to complete the arbitration panel. We do not think anything turns on the fact that the union or Ms. Mordowanec might have tried to enforce the Board's direction to establish a board of arbitration by seeking a judicial enforcement of the Board's direction pursuant to section 89(6) of the Act.

29. For the foregoing reasons, the Ontario Labour Relations Board respectfully advises the Honourable Minister of Labour as follows:

The arbitration process contemplated by the Board's decision of November 9, 1984, is a process under the parties' collective agreement (albeit required by the Board's decision) to which section 44(4) applies, and, accordingly, the Minister has the legal authority to appoint an employer nominee to the board of arbitration.

0326-85-U The Association of Professional Student Services Personnel, Complainant, v. The Board of Education for the City of York, Respondent, v. Elizabeth A. Carveth, Intervener

Arbitration - Practice and Procedure - Unfair Labour Practice - Dispute about payment of sum to employee under collective agreement - Board reviewing principles relating to deferral to arbitration - Deferring in circumstances where thrust of issue appropriate for decision by arbitrator

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members D. H. Blair and L. C. Collins.

APPEARANCES: Linda Rothstein and Anne Mills for the complainant; M. Patrick Moran and Norm Ahmet for the respondent; Elizabeth Carveth on her own behalf.

DECISION OF THE BOARD; June 27, 1985

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging violation of sections 64, 67 and 79 of the Act.

2. The respondent, by way of preliminary motion, submitted that the Board should not proceed to hear the merits of the complaint but rather defer to arbitration. The complainant opposed such deferral. The intervener took no position on the issue. The Board notes as well that the parties did reach agreement on a number of the facts pertaining to the dispute.

3. At the hearing, the Board made the following oral ruling:

The Board has considered the submissions of the parties with respect to the respondent's motion to defer to arbitration. There is no dispute that the general principles to be applied are those enunciated in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, particularly at paragraph 7. [For convenience, the Board herein sets out that paragraph.]

7. It may be that the Board's approach has been somewhat less refined but the American treatment of deferral is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC 17,083; *John Inglis Co. Ltd.*

(1953), 53 CLLC 17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC 15,185; *Heist Industrial Services Ltd.* (1963), 63 CLLC 16,263; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC 16,198 and *Collingwood Shipyards*, [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedure for dispute settlement which they have created. See *Kodak Canada Ltd.* [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont.) Ltd. et al.*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 at para. 4. However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.*, [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Greogry House*, [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.* (1961), 61 CLLC 16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited*, *supra*. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act or remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited*, *supra*, for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard and Stephenson*, *supra*, that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues.

The complaint is clearly directed to the propriety of the admitted payment of some \$2,400 to the intervenor. In the Board's view, this matter falls within issues properly before an arbitrator, i.e., it is a dispute over the interpretation, application or administration of the collective agreement. The Board recognizes that the union, in response to a query by the Board, is prepared to forego its grievance filed under the collective agreement if the Board proceeds to hear the complaint on its merits. Further, the Board recognizes that there has been substantial agreement on the facts already presented to the Board. However, on review of the Board's record, that agreement on the facts is not complete and there would be the necessity of hearing *viva voce* evidence. The Board notes as well, for example, that it is not clear whether the respondent's explanation for stopping its practice of providing dues information to the union is accepted without qualification by the complainant. Moreover, and as expressed in *Valdi*, the Board approaches the "deferral doctrine" from the position that the practice and procedure of collective bargaining is to be encouraged. The parties have yet to proceed to step 6 of the grievance procedure; step 7, arbitration, lies beyond that. The Board is extremely reluctant to hear a complaint where to do so would be to short-circuit, in effect, the parties' internal mechanisms for dispute resolution. It may well be that, on reflection and in the context of the step 6 procedure, the parties are able to resolve the issues in dispute without recourse to step 7. The Board does not wish to assume jurisdiction where the opportunity of such possible settlement would be precluded.

In the Board's view, the arbitrator does have jurisdiction under the collective agreement virtually co-extensive with the complaint as filed with the Board. The Board notes too that deferral to arbitration does not end the matter; the Board retains overall jurisdiction, again as stated in *Valdi*. The issue essentially is whether the thrust of the union's allegations could appropriately

be dealt with by the arbitrator with the Board retaining jurisdiction if one party asserts the arbitrator failed “to deal directly and explicitly with the unfair labour practice issues” (*Valdi, supra*, at para. 7). This process is the course considered by the Board as best in these circumstances.

Therefore, the Board grants the respondent’s motion and exercises its discretion under the Act to defer to arbitration.

4. The Board hereby confirms its oral ruling and, accordingly, the matter is deferred to arbitration.
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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1985

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0814-84-R:The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Corecon Developments, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

1514-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Ilda Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Incumbent Trade Union) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 735 Queenston Road, Hamilton, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (66 employees in unit). (*Having regard to the agreement of the parties*).

1518-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 362 Yonge Street, Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (39 employees in unit). (*Having regard to the agreement of the parties*).

1557-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 234 Bloor Street West, Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (64 employees in unit). (*Having regard to the agreement of the parties*).

1739-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. F.G. Andriuolo Foods Inc., (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at its premises located at 7240 Woodbine Avenue, Markham, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (52 employees in unit). (*Having regard to the agreement of the parties*).

1782-84-R:Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retail stores in Windsor, Ontario, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff and students employed on a co-operative training programme with a school, college or university." (100 employees in unit).

Unit #2: "all employees of the respondent at its retail stores in Windsor, Ontario, save and except department supervisors, persons above the rank of department supervisor, lead hand in receiving, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college, or university." (92 employees in unit). (*Clarity Note*).

1934-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 181 Eglinton Avenue East, in the City of Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (49 employees in unit). (*Having regard to the agreement of the parties*).

2004-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. C. Calisto Foods Inc., (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1180 Upper James Street, Hamilton, Ontario, save and except assistant hostesses

and persons above the rank of assistant hostess.”(68 employees in unit).(*Having regard to the agreement of the parties*).

2090-84-R:Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. M. Jeronimo Investments Inc., (Respondent).

Unit:“all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 269 Rexdale Blvd., Rexdale, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess.”(63 employees in unit).(*Having regard to the agreement of the parties*).

2112-84-R:United Steelworkers of America, (Applicant) v. R & R Trucking (Humberstone) Limited, (Respondent).

Unit:“all employees of the respondent working in and out of the City of Port Colborne, save and except foremen, persons above the rank of foreman, office and sales staff.”(10 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

2327-84-R:United Food and Commercial Workers International Union Local 1105P, (Applicant) v. Maple Lynn Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent at its Bon-EE-Best Eggs Division in Mississauga, save and except foremen/forewomen, persons above the rank of foreman/forewoman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(71 employees in unit).(*Having regard to the agreement of the parties*).

2590-84-R:Ontario Public Service Employees Union, (Applicant) v. West Lincoln Ambulance Limited (Respondent) v. Group of Employees, (Objectors).

Unit #1:“all employees of the respondent at Grimsby, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (7 employees in unit).

Unit #2:(*See: Applications for Certification Dismissed - No Vote Conducted.*)

3102-84-R:The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Riva Plumbing Ltd., (Respondent).

Unit #1:“all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(8 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

Unit #2:“all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns

of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(8 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

3128-84-R:The Canadian Union of Public Employees, (Applicant) v. Roseland Golf & Curling Club Limited, (Respondent).

Unit #1:“all employees of the respondent in Windsor, Ontario, save and except managers, those above the rank of manager, golf professional, and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.”(19 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

Unit #2:“all employees of the respondent in Windsor, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except managers, those above the rank of manager and golf professional.”(33 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

3313-84-R:Sudbury Mine, Mill & Smelter Workers Union Local 598, (Applicant) v. Mansour Rockbolting Limited and Mansour Mining Equipment Supply and Repair Incorporated, (Respondents) v. Group of Employees, (Objectors).

Unit:“all employees of Mansour Rockbolting Limited and Mansour Mining Equipment Supply and Repair Incorporated in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff.”(8 employees in unit).(*Having regard to the agreement of the parties*).

3332-84-R:Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Tricil (Sarnia) Limited, (Respondent).

Unit:“all office, clerical and technical employees of the respondent in Thorold and St. Catharines save and except supervisors, persons above the rank of supervisor, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(7 employees in unit).(*Having regard to the agreement of the parties*).

3385-84-R:United Food and Commercial Workers International Union, (Applicant) v. MacIver & Lines Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in the City of Mississauga, save and except forepersons, those above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(28 employees in unit).(*Having regard to the agreement of the parties*).

3402-84-R:United Food and Commercial Workers Union, Local 409, (Applicant) v. North American Lumber Limited, (Respondent).

Unit #1:“all employees of the respondent in the City of Thunder Bay, save and except manager, persons above the rank of manager, persons regularly employed for not more than twenty-four hours per week and persons covered by subsisting collective agreements in effect on the date hereof.”(13 employees in unit).

Unit #2: "all employees of the respondent in the City of Thunder Bay regularly employed for not more than twenty-four hours per week, save and except manager, persons above the rank of manager, and persons covered by subsisting collective agreements in effect on the date hereof." (2 employees in unit).

3417-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Landell Homes - Scarboro, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

3423-84-R: The International Union of Operating Engineers Local 796, (Applicant) v. Marcil Trust Company, (Respondent).

Unit: "all employees of the respondent at 130 Bloor Street West in Metropolitan Toronto, save and except superintendents, persons above the rank of superintendent, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3427-84-R: United Steelworkers of America, (Applicant) v. Temspec Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, engineering technicians, office and sales staff, and students employed during the school vacation period." (24 employees in unit).

3430-84-R: Labourers' International Union of North America, Local 247, (Applicant) v. Dustbane Enterprises Limited, (Respondent).

Unit: "all employees of Modern Building Cleaning, a Division of the respondent at the Post Office at 120 Clarence Street, Kingston, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

3479-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Center Tool & Mold Company Limited, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office staff, engineering and design staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (64 employees in unit). (*Having regard to the agreement of the parties*).

0017-85-R:International Union of Operating Engineers Local 796, (Applicant) v. Morguard Investments Limited, (Respondent).

Unit: "all employees of the respondent at its locations at 180 Dundas St. West and 123 Edward Street in Metropolitan Toronto, Ontario, engaged in building security operations, save and except superintendents, persons above the rank of superintendent, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*).

0054-85-R:Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Weston Bakeries Limited, (Respondent).

Unit: "all employees of the respondent at the City of North Bay, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

0069-85-R:Graphic Communications International Union, Local 466, (Applicant) v. Merry Packaging Division Nor Baker Industries Limited, (Respondent).

Unit: "all employees of the respondent at 39 Greenbelt Drive, Don Mills, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, technical and sales staff." (40 employees in unit). (*Having regard to the agreement of the parties*).

0074-85-R:Canadian Union of Public Employees, (Applicant) v. Corporation of the County of Lanark, (Respondent).

Unit: "all employees of the respondent at its Lanark Lodge Home for the Aged, Lanark County, save and except Department Heads, persons above the rank of Department Head, Registered and Graduate Nurses and Office and Clerical staff." (127 employees in unit). (*Having regard to the agreement of the parties*).

0075-85-R:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Chatham Moulding, A Division of 593168 Ontario Limited, (Respondent).

Unit: "all employees of the respondent in Raleigh Township, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

0077-85-R:International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (Applicant) v. Maple Screw Products (Toronto) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga save and except foremen, persons above the rank of foreman, office and sales staff." (46 employees in unit). (*Having regard to the agreement of the parties*).

0091-85-R:Graphic Communications International Union, Local 466, (Applicant) v. C B Packaging Division Nor Baker Industries Limited, (Respondent).

Unit: "all employees of the respondent at 309 Horner Avenue, Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (49 employees in unit). (*Having regard to the agreement of the parties*).

0092-85-R: United Food and Commercial Workers International Union, (Applicant) v. Westra Plastics (Ontario) Inc., (Respondent).

Unit: "all employees of the respondent at Dunnville, Ontario, save and except supervisors, persons above the rank of supervisor and office staff." (31 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0096-85-R: International Brotherhood of Painters and Allied Trades Local Union 557, (Applicant) v. Restoration Decorating Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

0099-85-R: Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ideal Glass & Mirror Makers Ltd., (Respondent).

Unit: "all employees of the respondent at Cannington, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (16 employees in unit). (*Having regard to the agreement of the parties*).

0102-85-R: Service Employees Union, Local 183, (Applicant) v. Franklin Lake Manor Nursing Home, Specialty Care Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the County of Frontenac, save and except director of care, those above the rank of director of care, food service supervisor and activity director." (10 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

0144-85-R: Service Employees Union, Local 478, (Applicant) v. Trout Creek Planing Mill Limited, (Respondent).

Unit: "all employees of the respondent at Trout Creek, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

0152-85-R:Ontario Nurses' Association, (Applicant) v. Hornepayne Community Hospital, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Hornepayne, Ontario, save and except the director of nursing, and persons above the rank of director of nursing, persons regularly employed for not more than twenty-four (24) hours per week and inservice co-ordinator/out-patient supervisor." (2 employees in unit).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than twenty-four (24) hours per week by the respondent in Hornepayne, Ontario, save and except director of nursing and persons above the rank of director of nursing, and co-ordinator/out-patient supervisor." (9 employees in unit).

0165-85-R:The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Van Mechanical Contractors Ltd., (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

0167-85-R:International Brotherhood of Painters and Allied Trades - Local Union 557, (Applicant) v. Associated Colour Consultants Ltd., (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

0169-85-R:Ontario Public Service Employees Union, (Applicant) v. St. Leonard's House London, (Respondent).

Unit #1: "all employees of the respondent in the County of Middlesex, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the County of Middlesex regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (8 employees in unit). (*Having regard to the agreement of the parties*).

0183-85-R:United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Applicant) v. Eureka Coach Company Limited, (Respondent).

Unit:“all employees of the respondent in the town of Concord, Ontario, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(106 employees in unit).(*Having regard to the agreement of the parties*).

0186-85-R:Service Employees Union, Local 478, (Applicant) v. Martin Manor Retirement Home, (Respondent).

Unit:“all employees of the respondent in Gravenhurst, save and except supervisors, persons above the rank of supervisor, professional nursing staff, physiotherapists, occupational therapists, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(12 employees in unit).(*Having regard to the agreement of the parties*).

0206-85-R:International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Woodbridge Foam Corporation, (Respondent).

Unit:“all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman, office, technical and sales staff.”(14 employees in unit).(*Having regard to the agreement of the parties*).

0213-85-R:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. G. S. Woolley 1978 Ltd., (Respondent).

Unit:“all employees of the respondent at 399 Kennedy Road, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(206 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

0218-85-R:United Steelworkers of America, (Applicant) v. Erno Manufacturing Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.”(126 employees in unit).(*Having regard to the agreement of the parties*).

0225-85-R:United Steelworkers of America, (Applicant) v. Converter Man Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff.”(12 employees in unit).(*Having regard to the agreement of the parties*).

0233-85-R:International Brotherhood of Painters and Allied Trades - Local 1891, (Applicant) v. Kozlov Drywall, (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Clarity Note*).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Clarity Note*).

0234-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. J.F. Eastwood Ltd. o/a St. Clair Paint and Wallpaper (London), (Respondent).

Unit: "all employees of the respondent at London, save and except assistant manager, persons above the rank of assistant manager, office staff, persons regularly employed for not more than twenty-four hours per week and students employed for the school vacation period." (10 employees in unit).

0249-85-R: United Steelworkers of America, (Applicant) v. Mark Controls Limited, (Respondent).

Unit: "all employees of the respondent at its warehouse in the City of Mississauga, save and except supervisors, those above the rank of supervisor, office, technical, sales and engineering staff." (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0253-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Dunn Paving Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all employees of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0263-85-R: Ontario Public Service Employees Union, (Applicant) v. North Bay Hospital Commission operating The North Bay Civic Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all paramedical employees of the respondent at North Bay, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of May 1, 1985." (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees of the respondent at North Bay, Ontario regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of May 1, 1985." (18 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0265-85-R: Service Employees Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Cheshire Home (Hastings-Prince Edward) Inc., (Respondent).

Unit: "all employees of the respondent at Belleville, save and except coordinators, persons above the rank of coordinator and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0272-85-R: Graphic Communications International Union, Local 500M, (Applicant) v. Nor-graphics (Canada) Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and employees in bargaining units for which any trade union held bargaining rights as of May 2, 1985." (12 employees in unit). (*Having regard to the agreement of the parties*).

0285-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Bar-Bro Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0293-85-R: United Steelworkers of America, (Applicant) v. Chartan Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (77 employees in unit). (*Having regard to the agreement of the parties*).

0332-85-R: Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent at its retail store at 1565 King Street East, Cambridge (P), save and except the store manager and persons above the rank of store manager." (67 employees in unit). (*Having regard to the agreement of the parties*).

0421-85-R: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. S & D Equipment Rentals Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1837-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees' Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations, c.o.b. as Swiss Chalet, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener).

Unit: "all employees of the respondent employed at its premises located at 245 Dixon Road, Etobicoke, Ontario, save and except chefs and persons above the rank of chef." (9 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		5
Number of ballots marked in favour of intervener		0

0024-85-R: Graphic Communications International Union, Local 500M, (Applicant) v. Mediacom Inc., Printing Division, (Respondent) v. The Sign and Pictorial Painters Local 1603, of the International Brotherhood of Painters and Allied Trades, (Intervener).

Unit: "all employees of the respondent working in and out of the Mississauga Plant, save and except employees acting in a supervisory or confidential capacity or having authority to hire, discharge or discipline employees, office and sales staff." (32 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	34	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		33
Number of ballots marked in favour of intervener		0

0106-85-R:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. ACF Grew Inc., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2679, (Intervener).

Unit: "all employees of the Company employed at its Boat Division in Penetanguishene, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (165 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		173
Number of persons who cast ballots	161	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		158
Number of ballots marked in favour of intervener		2

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1223-84-R:Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Miracle Feeds, a division of Ogilvie Mills Ltd., Idealease (London) Ltd., and 571591 Ontario Inc., (Respondents).

Unit: "all employees of the respondent working in and out of London, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (10 employees in unit).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Ballots segregated and not counted	1

1992-84-R:International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), (Applicant) v. International Robotic Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for less than 24 hours per week and students employed during the school vacation period." (35 employees in unit).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Number of names of persons on revised voters' list		35
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		32
Number of ballots marked against applicant		3

3251-84-R:Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC, (Applicant) v. Windsor Ceramic Tile Canada Limited, (Respondent).

Unit: "all employees of the respondent at Windsor save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period." (26 employees in unit).

Number of names of persons on revised voters' list		64
Number of persons who cast ballots	55	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		51
Number of ballots marked against applicant		3

3324-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Vision Carpentry Ltd. and Apoca Carpentry Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent engaged in residential construction in the Province of Ontario (excluding Board Areas #1 and 19-25, inclusive) save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		0

3460-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Freeformfive International Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant at Markham, save and except plant superintendent, persons above the rank of plant superintendent, office and sales staff." (60 employees in unit).

Number of names of persons on revised voters' list		59
Number of persons who cast ballots	60	
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		24
Ballots segregated and not counted		2

0021-85-R: The Canadian Union of Public Employees, (Applicant) v. The Metropolitan Toronto Zoological Society, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except shop manager, persons above the rank of shop manager and employees in bargaining units for which any trade union held bargaining rights as of April 2, 1985." (12 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		4

Applications for Certification Dismissed - No Vote Conducted

1992-84-R:International Union, United Automobile Aerospace & Agricultural Implement Workers of America (UAW), (Applicant) v. International Robotic Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).(5 employees in unit).

Unit #1:(See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote.*)

2590-84-R:Ontario Public Service Employees Union, (Applicant) v. West Lincoln Ambulance Limited (Respondent) v. Group of Employees, (Objectors).(3 employees in unit).

Unit #1:(See: *Bargaining Agents Certified - No Vote Conducted.*)

3048-84-R:Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. The Metropolitan General Hospital, (Respondent) v. Thomas A. Hebert, (Employee/Objector).(68 employees in unit).

3359-84-R:International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. Sandrin Brothers Limited, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener) v. Group of Employees, (Objectors).(65 employees in unit).

0019-85-R:Labourers' International Union of North America, Local 183, (Applicant) v. 581201 Ontario Limited Bayview Summit Development Limited, (Respondent).(2 employees in unit).

0090-85-R:United Rubber, Cork, Linoleum and Plastic Workers of America, (Applicant) v. J. Stahle Industries Inc., (Respondent) v. Group of Employees, (Objectors).(75 employees in unit).

0134-85-R:Energy and Chemical Workers Union, (Applicant) v. Dearborn Chemical Company Limited, (Respondent).(11 employees in unit).

0173-85-R:Graphic Communications International Union, Local 466, (Applicant) v. Guelph Paper Box Company Limited, (Respondent) v. Group of Employees, (Objectors).(45 employees in unit).

0207-85-R:Union of Bank Employees, Local 2104, (Applicant) v. The National Victoria & Grey Trust, (Respondent) v. Group of Employees, (Objectors).(81 employees in unit).

0257-85-R:Ontario Public School Teachers' Federation, (Applicant) v. Scarborough Board of Education, (Respondent).(252 employees in unit).

0294-85-R:United Steelworkers of America, (Applicant) v. Laidlaw Wire of Canada Ltd., (Respondent).(17 employees in unit).

0318-85-R:United Steelworkers of America, (Applicant) v. Shaw Pipe Protection Limited, (Respondent).(48 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3489-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. MarMarc Foods Ltd., (Respondent).

Unit: "all employees of the respondent at Alexandria, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department store managers, persons above the rank of department manager, clerical and office staff." (32 employees in unit).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		26
Ballots segregated and not counted		2

0052-85-R: Association of Allied Health Professionals: Ontario, (Applicant) v. Laurentian Hospital, (Respondent) v. Canadian Union of Public Employees and its Local 161, (Intervener #1) v. Ontario Public Service Employees Union, (Intervener #2).

Unit: "all paramedical employees of the respondent at Sudbury, save and except supervisors, persons above the rank of supervisor, university and community college students employed pursuant to a co-operative or degree program, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and employees in the bargaining units for which any trade union held bargaining rights as of April 9, 1985." (94 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		57
Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		32

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2400-82-R: Communications Workers of Canada, (Applicant) v. CTG Telecommunications Systems, Inc. c.o.b. as Canadian Telecommunications Group, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, managers, persons above the rank of supervisor or manager, sales staff, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (60 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		70
Number of persons who cast ballots	69	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		66

3037-84-R: Labourers' International Union Local 1267, (Applicant) v. Ralph Spademan Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working in and out of the Town of Whitchurch-Stouffville, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in unit).

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	13

3355-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. La-Z-Boy Canada Limited, (Respondent) v. Deluxe Upholstering Employees' Association, (Intervener).

Unit: "all hourly rated and incentive plan employees of the respondent at its factory in Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and part-time employees." (164 employees in unit).

Number of names of persons on revised voters' list	171
Number of persons who cast ballots	171
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	57
Number of ballots marked in favour of intervener	112

3398-84-R: Office & Professional Employees International Union, (Applicant) v. Ad-Scan Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Office Manager and persons above the rank of Office Manager, Sales Staff and persons regularly employed for not more than twenty-four hours per week." (19 employees in unit).

Number of names of persons on list as originally prepared by employer	21
Number of persons who cast ballots	20
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	15

3458-84-R: Teamsters Chemical, Energy & Allied Workers Union Local 424, (Applicant) v. Santech Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed in the school vacation period." (22 employees in unit).

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	16

0102-85-R: Service Employees Union, Local 183, (Applicant) v. Franklin Lake Manor Nursing Home, Specialty Care Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See *Bargaining Agents Certified - No Vote Conducted*)

Unit #2: "all registered nurses employed by the respondent in the County of Frontenac, save and except the head nurse and those above the rank of head nurse." (3 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3

APPLICATIONS FOR CERTIFICATION WITHDRAWN

3408-84-R:Hotel Employees & Restaurant Employees Union, Local 75, (Applicant) v. Valbay Hotel Limited, (Respondent).

3488-84-R:Labourers' International Union of North America, Local 1059, (Applicant) v. Ralph Gillan Trenching and Excavating, (Respondent).

0016-85-R:United Brotherhood of Carpenters & Joiners of America, Local #494, (Applicant) v. Robson Acoustics & Drywall Inc., (Respondent).

0078-85-R:Labourers' International Union of North America, Local 183, (Applicant) v. Cre-son Investments Limited and/or Fairfield Management Inc., (Respondent).

0145-85-R:International Union of Operating Engineers, Local 793, (Applicant) v. Rowad Pipelines Ltd., (Respondent).

0164-85-R:The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Automatic Boiler, (Respondent).

0166-85-R:Canadian Union of Public Employees, (Applicant) v. Red Lake Area Combined Roman Catholic Separate School Board, (Respondent).

0250-85-R:United Steelworkers of America, (Applicant) v. MCC Powers A Unit of Mark Controls Limited, (Respondent).

0274-85-R:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Stackpole Limited, (Respondent).

0277-85-R:Labourers' International Union of North America, Local 183, (Applicant) v. Cre-son Investments Limited and/or Fairfield Management Inc., and/or Fairfield Management Limited and/or Montevideo Limited Partnership and/or Montevideo Park Ltd., Partnership and/or The South Shore Ltd., Partnership and/or Lakeview Limited Partnership and/or Glen Erin Acres Ltd., Partnership, (Respondents).

0350-85-R:Canadian Union of Public Employees, (Applicant) v. The London Public Library Board, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2105-84-R:Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicants) v. Hespeler Concrete Floors Ltd., Puslinch Concrete Floors Limited, (Respondents).(*Granted*).

2133-84-R:United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Karl Thier Construction Limited and Penka Carpentry Limited, (Respondents).(*Granted*).

3223-84-R:Teamsters' Local Union No. 230 Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Applicant) v. Bertrand Concrete Products Ottawa Inc., Grant Float Services Incorporated, (Respondent).(*Withdrawn*).

3339-84-R:United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Cataraqui Door Consultants Ltd. and Ottawa Door Consultants Ltd., (Respondents).(*Granted*).

3412-84-R:United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. John M.M. Troup Limited, Trojan Interior Contracting Limited, Robson Acoustics & Dry-wall Inc., (Respondents).(*Granted*).(*Withdrawn with respect to John M.M. Troup Limited*).

0031-85-R:Schneider Employees Association, (Applicant) v. J.M. Schneider Inc. & Link Services Inc., (Respondent).(*Withdrawn*).

0101-85-R:United Steelworkers of America, (Applicant) v. The Algoma Steel Corporation, Limited and The Superior Limited Partnership, (Respondents).(*Granted*).

0221-85-R:Service Employees International Union, Local 219, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Empire Maintenance Industries Inc., and The Ottawa University, (Respondents).(*Withdrawn*).

SALE OF A BUSINESS

2105-84-R:Labourers' International Union of North America, Ontario Provincial District Council & Labourers' International Union of North America, Local 1081, (Applicant) v. Hespeler Concrete Floors Ltd., Puslinch Concrete Floors Limited, (Respondent).(*Dismissed*).

2655-84-R:Loeb Inc., (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, (Respondent).(*Dismissed*).

3028-84-R:International Beverage Dispensers and Bartenders Union, Local 280, (Applicant) v. Metro Investment Corporation, (Respondent).(*Dismissed*).

0030-85-R:Schneider's Employees' Association, (Applicant) v. J.M. Schneider Inc. & Link Services Inc., (Respondents).(*Withdrawn*).

UNION SUCCESSOR RIGHTS

1581-84-R:The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. 544489 Ontario Inc. (Canada Fans Ltd.), (Respondent).(*Granted*).

1597-84-R:The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Federal White Cement Inc., (Respondent).(*Granted*).

1598-84-R:The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Westroc Industries Ltd., (Respondent).(*Granted*).

2282-84-R:Canadian Union of Public Employees, (Applicant) v. Bethesda Service Employees Association, (Respondent) v. Bethesda Home for the Mentally Handicapped Inc., (Intervener) v. Group of Employees, (Objectors).(*Granted*).

3409-84-R:Graphic Communications International Union, Local 540-S, Hamilton, (Applicant) v. National Paper Goods, Division of Converters Paper Group Limited, (Respondent).(*Granted*).

3410-84-R:Graphic Communications International Union, Local 520-S, Peterborough, (Applicant) v. Peterborough Paper Converters Inc., (Respondent).(*Granted*).

3411-84-R:Graphic Communications International Union, Local 425-C, Niagara Peninsula, (Applicant) v. The St. Catharines Standard Limited, (Respondent).(*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3074-84-R:Dale Regan et al, (Applicant) v. International Union of Electrical, Radio and Machine Workers, Local 549, (Respondent) v. Granada TV Rental Limited, (Intervener).

Unit: "all employees of the respondent in the City of Ottawa, save and except Branch Managers, persons above the rank of Branch Manager, office, clerical, legal-collection and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (19 employees in unit).(*Granted*).

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	19
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	16

3146-84-R:Employees of Tuberate Company Incorporated, (Applicant) v. Boilermakers Local 128, (Respondent) v. Tuberate Company Incorporated, (Intervener).

Unit: "all employees of the respondent at Sarnia, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, professional engineers, office and clerical staff." (24 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	20
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	20

3317-84-R: Marcel St. Amour, (Applicant) v. Teamsters Local Union #230, (Respondent) v. Denis Brisebois, (Intervener). (5 employees in unit). (*Dismissed*).

3318-84-R: Denis Brisebois Contractor Ltd., (Applicant) v. Teamsters Local Union No. 230, (Respondent). (5 employees in unit). (*Withdrawn*).

3470-84-R: Diane Halman, (Applicant) v. Retail, Wholesale and Department Store Union Local 579, (Respondent) v. Benc Hotel Holdings Limited, (Intervener). (2 employees in unit). (*Granted*).

3494-84-R: Ann Julien, (Applicant) v. Retail, Wholesale and Department Store Union, (Respondent) v. Manoir Hotel Ltd. (Operating as Laurential Hotel, Sudbury), (Intervener). (2 employees in unit). (*Granted*).

0214-85-R: Daryl Smith, (Applicant) v. United Plant Guard of America Local 1962, (Respondent). (70 employees in unit). (*Withdrawn*).

0359-85-R: Employees of Sears, Peterborough Maureen L. Day, representative, (Applicant) v. Retail, Wholesale and Department Store Union, (Respondent). (53 employees in unit). (*Dismissed*).

0362-85-R: Robert Moriarity, Albert Brunett and Ronald Barbe, (Applicant) v. United Steelworkers of America, Local 8327, (Respondent). (3 employees in unit). (*Granted*).

0384-85-R: Michael S. Rempel, (Applicant) v. United Steelworkers of America, Local 9075, (Respondent). (6 employees in unit). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0454-85-U: Doef's Ironworks Ltd., (Applicant) v. John Huibers and Donald Smith, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0363-85-U: Con-Eng Contractors Inc., (Applicant) v. Bill McRoberts, Alex Glenn, Larry O'Neill, Fred Farkas, The Sheetmetal Workers International Association, Local 537; United

Association of Plumbers and Pipe Fitters of North America, Local 666; International Brotherhood of Electrical Workers, Local 303; and International Brotherhood of Painters and Allied Trades, Local 205, (Respondents).(*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2407-83-U:Mikko Vesa, Ronald Pruys and Garrett Kruger, (Complainants) v. International Brotherhood of Electrical Workers, Local 402, (Respondent) v. D.R. McCormick Electric Ltd., (Employer).(*Dismissed*).

0458-84-U:Ontario Public Service Employees Union, (Complainant) v. Port Colborne Ambulance Service, (Respondent).(*Withdrawn*).

1997-84-U:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. International Robotic Manufacturing, (Respondent).(*Withdrawn*).

2029-84-U:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. International Robotic Manufacturing, (Respondent).(*Withdrawn*).

2160-84-U:Hotel Employees and Restaurant Employees Union, Local 75, (Complainant) v. Valbay Hotel Limited, (Respondent).(*Withdrawn*).

2265-84-U:International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. International Robotic Manufacturing, (Respondent).(*Withdrawn*).

2340-84-U:Michael Ross, (Complainant) v. NTN Bearing Mfg. Canada, Ltd. and United Steelworkers of America, (Respondents) v. Klaus Hatje, (Intervener).(*Dismissed*).

2846-84-U:Ontario Nurses' Association, (Complainant) v. Spencer Brothers Nursing Home, (Respondent).(*Withdrawn*).

2925-84-U:Canadian Union of Public Employees and its Local 3020, (Complainant) v. The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic), (Respondent).(*Granted*).

3027-84-U:International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. Metro Investment Corporation c.o.b. as Doyles Tavern, Anthony Indovina, and Last Resort Hotel Inc., (Respondents).(*Granted*).

3045-84-U:Teamsters Local Union 230, (Complainant) v. Bertrand Concrete Products Ottawa Inc., (Respondent).(*Withdrawn*).

3097-84-U:Health, Office & Professional Employees, a Division of Local 206 United Food & Commercial Workers Union Chartered by the United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Complainant) v. Century Manor Health Care Centre, (Respondent).(*Dismissed*).

3250-84-U:Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC, (Complainant) v. Portion Packaging Ltd. Division of Consumers Glass Co. Ltd., (Respondent).(*Withdrawn*).

3283-84-U:International Union of Bricklayers and Allied Craftsmen Local 12, (Complainant) v. Dejayko Masonry Limited, (Respondent).(*Withdrawn*).

3293-84-U:John Glykis, (Complainant) v. Hotel Employees and Restaurant Employees Union, Local 75, (Respondent) v. The Four Seasons Hotels Limited (Inn on the Park), (Intervener).(*Dismissed*).

3308-84-U:Canadian Union of Public Employees and its Local 191, (Complainant) v. The Corporation of the Town of Kenora, (Respondent).(*Withdrawn*).

3319-84-U:Gary Hopkins, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 199, (Respondent) v. General Motors of Canada Limited, (Intervener).(*Dismissed*).

3333-84-U:Brian Wreggitt, (Complainant) v. Rugged Air Systems/Racco Industrial Roofing, (Respondent).(*Withdrawn*).

3338-84-U:Joseph W. Taylor, (Complainant) v. Sheller Globe of Canada, (Respondent).(*Withdrawn*).

3345-84-U:Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Ontario Motor League (Ottawa Club), (Respondent).(*Withdrawn*).

3354-84-U:Ashton Murray, (Complainant) v. United Plant Guard Workers of America, (Respondent) v. The Jockey Club, (Intervener).(*Dismissed*).

3360-84-U:The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 593, on behalf of Colin Mead, Paul Walsh and Frank Smeding, (Complainant) v. J.B. Allen & Company Ltd., (Respondent).(*Withdrawn*).

3361-84-U:The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, on behalf of Wayne Percival, (Complainant) v. J.B. Allen and Company Ltd., (Respondent).(*Withdrawn*).

3362-84-U:United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Complainant) v. Lanewood Corp. and Lanewood Mechanical Contractors, (Respondents).(*Granted*).

3366-84-U:Filomena Zannuti, (Complainant) v. Fur, Leather, Shoe & Allied Workers' Union, (Respondent).(*Withdrawn*).

3386-84-U:Michelle Ireland, (Complainant) v. Labourers' International Union of North America Local 183, (Respondent).(*Withdrawn*).

3403-84-U:Canadian Union of Public Employees, (Complainant) v. Corporation of the County of Lambton at Twilight Haven Rest Home, Petrolia, Ontario, (Respondent).(*Withdrawn*).

3405-84-U:Balkaran Singh, (Complainant) v. United Steelworkers of America AFL-CIO-CLC Local Union 13491, (Respondent).(*Withdrawn*).

3433-84-U:Canadian Union of Public Employees, Local 2387, (Complainant) v. Charterways Transportation Limited, (Respondent).(*Withdrawn*).

3445-84-U:Teresa Moynihan, (Complainant) v. York University Staff Association, Shirley Ittas (President), Majells Power (Chairperson, Grievance Committee), (Respondent).(*Withdrawn*).

3459-84-U:Canadian Union of Public Employees, (Complainant) v. Cornwall General Hospital, (Respondent).(*Withdrawn*).

3466-84-U:Metropolitan Toronto Demolition Contractors Inc., (Complainant) v. Labourers' International Union of North America, Ontario Provincial District Council and the Employers listed on Schedule "A", (Respondents).(*Withdrawn*).

3480-84-U:Office & Professional Employees International Union, (Complainant) v. Wasserman Consultants Limited, (Respondent).(*Withdrawn*).

3481-84-U:James Phillip Grise, (Complainant) v. International Alliance Theatrical Stage Employees (Local 58), (Respondent).(*Withdrawn*).

3482-84-U:Robert Seubert, (Complainant) v. Tie Communications Canada Inc., United Electrical Workers, Local 518, (Respondents).(*Withdrawn*).

0032-85-U:Schneider's Employees Association, (Complainant) v. J.M. Schneider Inc. and Link Services Inc., (Respondent).(*Withdrawn*).

0035-85-U:United Garment Workers of America Local 253, (Complainant) v. Mr. Paul Hecht, Cumberland Clothing Limited, (Respondent).(*Withdrawn*).

0047-85-U:United Food and Commercial Workers International Union Local 175, (Complainant) v. S. Gumperts of Canada Limited c.o.b. as Gumperts, (Respondent).(*Withdrawn*).

0048-85-U:Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Finished Woodfloor Ltd., Satin Finish Hardwood Flooring, Ontario Ltd. Satin Finish Hardwood Flooring, (Respondents).(*Withdrawn*).

0072-85-U:Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Coca-Cola Ltd., (Respondent).(*Dismissed*).

0087-85-U:Harold Gallerno and Donald Gordon, (Complainants) v. UAW Local 251, Libby Bargaining Committee, Mike Van Damme, Mike Wicks, Greg Pray, (Respondents).(*Withdrawn*).

0110-85-U:Randy Brown, (Complainant) v. Mylex Electronics Ltd., (Respondent).(*Withdrawn*).

0119-85-U:Mr. Carol Guindon, Manager-Employee Relations Miracle Mart, (Complainant) v. Commercial Workers Union - Local 486, (Respondent).(*Withdrawn*).

0136-85-U:United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent).(*Withdrawn*).

0137-85-U:United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent).(*Withdrawn*).

0143-85-U:Jamie McInnes, (Complainant) v. Peter Macks, (Respondent).(*Withdrawn*).

0148-85-U:William House, (Complainant) v. United Steelworkers of America Local 2251, (Respondent).(*Withdrawn*).

0159-85-U:United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent).(*Withdrawn*).

0190-85-U:Office & Professional Employees International Union, Local 343, (Complainant) v. The United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Respondent).(*Withdrawn*).

0192-85-U:Service Employees Union, Local 183, (Complainant) v. Franklin Lake Manor Nursing Home, Specialty Care Inc., (Respondent).(*Withdrawn*).

0220-85-U:Service Employees International Union, Local 219, A.F.L.-C.I.O.-C.L.C., (Complainant) v. Empire Maintenance Industries Inc. and The Ottawa University, (Respondents).(*Withdrawn*).

0248-85-U:John Knapp, President of Local 116 Canadian Guards Association, (Complainant) v. The Westin Hotel, (Respondent).(*Withdrawn*).

0278-85-U:United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent).(*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0036-85-U:United Garment Workers of America, Local 253, (Applicant) v. Mr. Paul Hecht, Cumberland Clothing Limited, (Respondent).(*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3485-84-M:The Textile Rental Institute of Ontario by and on behalf of Brighton Laundry Limited, Canadian Linen Supply Co. Ltd., Canadian Linen Supply Co. Ltd. - Total Service Division, Cardwell Laundry Limited, Faster Linen Service, Leader Linen Supply, Model Laundry,

Stork Diaper Service Company Limited, Topper Linen Supply Limited, Unitog Canada Ltd., Whiteway Industrial Linen Service Ltd. and Work Wear Corporation of Canada Ltd., (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union).(*Granted*).

0100-85-M:The Textile Rental Institute of Ontario by and on behalf of Booth Avenue Hospital Laundry Inc., Centennial Hospital Linen Service, and London Hospital Linen Service, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union, Local 351, (Trade Union).(*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1795-84-M:Office & Professional Employees International Union, Local 418, CLC, (Applicant) v. Domtar Fine Papers, (Respondent).(*Withdrawn*).

1806-84-M:The Oshawa General Hospital, (Applicant) v. Canadian Union of Public Employees, Local 45, (Respondent).(*Withdrawn*).

2328-84-M:The Kenora Board of Education, (Applicant) v. C.U.P.E. Local 1939, (Respondent).(*Withdrawn*).

2453-84-M:Canadian Union of Public Employees, Local 167, (Applicant) v. The Corporation of the City of Hamilton, (Respondent).(*Withdrawn*).

2583-84-M:The Corporation of the Town of Timmins, (Applicant) v. Canadian Union of Public Employees, Local 210, (Respondent).(*Withdrawn*).

2844-84-M:The Corporation of the United Counties of Prescott & Russell, (Applicant) v. Canadian Union of Public Employees, (Respondent).(*Withdrawn*).

3328-84-M:Hotel, Clubs, Restaurant, Taverns Employees Union, Local 261, (Applicant) v. Talisman Motor Inn, (Respondent).(*Withdrawn*).

0279-85-M:Service Employees International Union, Local 204, (Applicant) v. The North York General Hospital, (Respondent).(*Dismissed*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1429-83-OH:Derry McKeever & Mark Buckwheat, (Complainants) v. Ken Marshall and Canada Farm Limited, (Respondents).(*Dismissed*).

COLLEGES COLLECTIVE BARGAINING ACT

2549-84-U:The Ontario Public Service Employees Union, (Complainant) v. Fanshawe College of Applied Arts and Technology, (Respondent).(*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

1480-84-M:Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association Traugott Construction Limited, (Respondent).(*Withdrawn*).

2106-84-M:Sheet Metal Workers' International Association Local 30 Toronto, (Applicant) v. Margven Roofing Limited & M. & S. Roofing Limited, (Respondent).(*Withdrawn*).

2302-84-M:United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. MCY Construction Ltd., (Respondent).(*Dismissed*).

2506-84-M:United Brotherhood of Carpenters and Joiners of America, Locals 1316 and 494, (Applicant) v. J.A. MacDonald (London) Ltd., (Respondent).(*Withdrawn*).

2805-84-M:United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Gilbert Construction (1981) Ltd., (Respondent).(*Granted*).

2860-84-M:International Union of Elevator Constructors, Local #50, (Applicant) v. Otis Elevator Company Limited, (Respondent).(*Withdrawn*).

2919-84-M:Bricklayers, Masons Independent Union of Canada, Local 1, (Applicant) v. The Masonry Contractors' Association of Toronto Inc., Style Masonry Ltd., (Respondents).(*Withdrawn*).

3218-84-M:United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. Richard B. Ryan Ltd., (Respondent).(*Granted*).

3267-84-M:United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Clay Bradshaw Inc., (Respondent).(*Withdrawn*).

3421-84-M:Labourers' International Union of North America, Local 506, (Applicant) v. K.G. Scaffolding Ltd., (Respondent).(*Withdrawn*).

3435-84-M:Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Laframboise Mechanical Ltd., (Respondent).(*Withdrawn*).

3469-84-M:The United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Catarauqui Door Consultants Ltd. and Ottawa Door Consultants Ltd., (Respondent).(*Withdrawn*).

0005-85-M:Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Taylor Manufacturing Industries Inc., (Respondent).(*Granted*).

0104-85-M:Labourers International Union of North America, Local 506, (Applicant) v. Humber Plumbing and Heating Ltd., (Respondent).(*Withdrawn*).

0107-85-M:Sheet Metal Workers' International Association Local Union 537, (Applicant) v. Bertozzi Roofing & Sheet Metal Inc., (Respondent).(*Granted*).

0126-85-M:Carpenters District Council of Toronto & Vicinity on behalf of Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bradsil Limited, (Respondent).(*Granted*).

0150-85-M:Labourers' International Union of North America Local 183, (Applicant) v. Di Giacomo Canada Incorporated, (Respondent).(*Withdrawn*).

0160-85-M:Labourers' International Union of North America, Local 183, (Applicant) v. Toronto Housing Labour Bureau and Great Gulf Homes, (Respondents). (*Withdrawn*).

0171-85-M:Labourers' International Union of North America, Local 183, (Applicant) v. Concord Concrete and Drain Incorporated, (Respondent).(*Withdrawn*).

0172-85-M:Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Paving Company, (Respondent).(*Withdrawn*).

0179-85-M:International Union of Operating Engineers, Local 793, (Applicant) v. Tacc Construction Company Ltd., (Respondent).(*Withdrawn*).

0191-85-M:United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 113, (Applicant) v. 447365 Ontario Limited, carrying on business as Burke Mechanical Contractors, (Respondent).(*Withdrawn*).

0198-85-M:Labourers' International Union of North America, Local 527, (Applicant) v. Ferano Construction Ltd., (Respondent).(*Withdrawn*).

0210-85-M:The International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 736 and Ironworkers District Council of Ontario, (Applicants) v. Rollins Steel Services Ltd., (Respondent).(*Granted*).

0232-85-M:United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Korban Inc., (Respondent).(*Granted*).

0235-85-M:Labourers' International Union of North America, Local 607, (Applicant) v. P.B. Rombough Ltd., (Respondent).(*Granted*).

0236-85-M:Christian Labour Association of Canada, (Applicant) v. Lincar Mechanical Limited, (Respondent).(*Granted*).

0260-85-M:Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Halton Drywall Limited, (Respondent).(*Withdrawn*).

0262-85-M:Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Florida Drywall Co. Limited, (Respondent).(*Withdrawn*).

0266-85-M:International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 721, (Applicant) v. Wilson Welding and Fabricating Ltd., (Respondent).(*Granted*).

0281-85-M:International Union of Operating Engineers, Local 793, (Applicant) v. Sherway Contracting (Windsor) Ltd., (Respondent).(*Withdrawn*).

0296-85-M:The International Brotherhood of Electrical Workers L.U. 1687 Sudbury of the IBEW Construction Council of Ontario, (Applicant) v. Wilglen Mechanical & Electrical Ltd., (Respondent).(*Granted*).

0311-85-M:Labourers' International Union of North America, Local 183, (Applicant) v. 567365 Ontario Limited, (Respondent).(*Withdrawn*).

0334-85-M:International Union of Operating Engineers, Local 793, (Applicant) v. State Contractors Inc., (Respondent).(*Withdrawn*).

0338-85-M:United Brotherhood of Carpenters and Joiners of America Local 249, (Applicant) v. A.S.P. Access Floors, (Respondent).(*Withdrawn*).

0368-85-M:International Union of Operating Engineers, Local 793, (Applicant) v. Sarnia Cranes Ltd., (Respondent).(*Withdrawn*).

0382-85-M:The Ontario Council of International Brotherhood of Painters and Allied Trades Local 1494, (Applicant) v. Malec Building Products Limited, (Respondent).(*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3085-83-U:John (Jack) James, (Complainant) v. Labourers' International Union of North America, and its Locals 493 and 527, O.J. Pipelines Inc., (Respondents).(*Dismissed*).

0652-84-R:International Union of Operating Engineers, Local 793, (Applicant) v. Land Excavating and Grading, a division of P.S. Excavating & Grading Limited and of 590812 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).(*Granted*).

3059-84-R:United Steelworkers of America, (Applicant) v. Exide Canada Corp., (Respondent).(*Granted*).

APPLICATIONS FOR ACCREDITATION

1539-84-R:Metropolitan Toronto Sewer and Watermain Contractors Association, (Applicant) v. The Council of Trade Unions Acting as the Representative and Agent of Teamsters' Local Union 230, and Labourers' International Union of North America, Local Union 183, (Respondents) v. The Ontario Formwork Association, (Intervener #1) v. Metropolitan Toronto Road Builders' Association, (Intervener #2).(*Withdrawn*).

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